85-1598

Supreme Court, U.S.
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No. 85-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

STEIN DISTRIBUTING COMPANY, INC.,
Appellant,

v.

DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO & FIREARMS,
Appellee.

On Appeal From the United States Court of Appeals for the Ninth Circuit

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether, consistent with the Twenty-first Amendment, a statute of the State of Idaho, *Idaho Code* 23-1325A, directly regulating the distribution of wine solely within the borders of Idaho and expressly authorizing the marketing practices of appellant at issue in this case, is preempted by § 5(b)(3) of the Federal Alcohol Administration Act, 27 U.S.C. § 205(b)(3), as interpreted and implemented by BATF regulations, 27 C.F.R. § 6.99.

2. Whether a statute of the State of Idaho, *Idaho Code* § 23-1325A, enacted by the Idaho legislature for the purpose of regulating, and which expressly authorizes, the marketing practices of appellant in this case, is in conflict with § 5(b)(3) of the Federal Alcohol Administration Act, 27 U.S.C. § 205(b)(3), as interpreted and implemented by BATF regulation, 27 C.F.R. § 6.99.

3. Whether Congress intended, in enacting § 5(b)(3) of the Federal Alcohol Administration Act, 27 U.S.C. § 205(b)(3), to preclude the marketing practices of appellant which appellee found in this case to be in violation of § 5(b)(3).*

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* All parties to this case are named in the caption. Appellant, Stein Distributing Company, Inc., is a closely held Idaho corporation and has no parent, subsidiary or affiliate within the meaning of Rule 28.1 of the Rules of this Court.

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DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO & FIREARMS,
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On Appeal From the United States Court of Appeals for the Ninth Circuit

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JURISDICTIONAL STATEMENT

Stein Distributing Company, Inc. ("Stein"), the appellant, appeals from the final decision of the United States Court of Appeals for the Ninth Circuit affirming an order of the Bureau of Alcohol, Tobacco & Firearms of the Department of the Treasury ("BATF"). In its opinion, the Ninth Circuit rejected Stein's arguments that its conduct at issue in this case is shielded from federal regulation by virtue of a statute enacted by the Idaho legislature expressly authorizing Stein's conduct in this case, holding that state statute to be preempted by federal law. In doing

so, the court below explicitly acknowledged that its decision was in conflict with two decisions of the United States Court of Appeals for the Fifth Circuit. The Ninth Circuit also held that Stein's conduct fell within the purview of the BATF's statutory authority; its decision on that point is in square conflict with a decision of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the Ninth Circuit is reproduced in App. A, *infra*, 1a-10a, and is reported at 779 F.2d 1407 (9th Cir. 1986). The order of the Director of the BATF modifying and affirming the "Initial Decision" of the administrative law judge in this case is reproduced in App. B, *infra*, 11a-37a; that "Initial Decision" is reproduced in App. C, *infra*, 38a-86a.

JURISDICTION

This case arises out of a petition filed in the court of appeals by appellant for review of a final order of the BATF; jurisdiction to review that order is conferred on the court of appeals by 27 U.S.C. § 204(h). The BATF order was affirmed by the court below on January 3, 1986. No rehearing was sought. A notice of appeal of this case to this Court was filed in the court below on March 10, 1986, and is reproduced in App. D, *infra*, 87a-88a. This Court has jurisdiction over this case under 28 U.S.C. § 1254(2).[1] *See Fran-*

[1] In the court below, Stein expressly raised the argument that Idaho law, including *Idaho Code* § 23-1325A, shielded its conduct from regulation by the BATF; the court, responding to that argument, held that the State's interest embodied in § 23-1325A could not prevail over the "strong federal interest" the court

chise Tax Board of California v. *United States Postal Service*, No. 83-372 (June 11, 1984), slip. op., at 3 n.7, 104 S. Ct. 2549, 2551 n.7 (1984). This appeal is being docketed in this Court within 90 days from the January 3, 1986 entry of the decision of the court below, which entered no separate order.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Supremacy Clause, Art. VI, cl. 2 of the Constitution, provides, in pertinent part, that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . .

2. Section 2 of Amendment XXI provides, in pertinent part, that:

> The transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

3. *Idaho Code* § 23-1325A (Supp. 1985), reads as follows:

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found to be embodied in the Federal Alcohol Administration Act. App. A, *infra*, 6a, 779 F.2d, at 1411. This Idaho statute was, therefore, necessarily held by the court below to be preempted under the Supremacy Clause, Art. VI, cl. 2 of the Constitution; thus, it is "reasonably clear that the [Ninth Circuit] independently concluded that the [Idaho] statute governs the case and held the [Idaho] statute itself unconstitutional as so applied." *Burger King Corp.* v. *Rudzewicz*, No. 83-2097 (May 20, 1985), slip op., at 8 n.12, 105 S. Ct. 2174, 2181 n.12 (1985).

> Services permitted incident to stocking, rotation and restocking of wine.—For the purposes of section 23-1325(1)(e), Idaho Code, a distributor may, with the permission of the retailer, and in accordance with space allocations directed by the retailer, set, remove, replace, reset or relocate all wine upon the shelves of the retailer. Labor performed or schematics prepared by the distributor relating to conduct authorized pursuant to the provision of this section shall not constitute prohibited conduct or unlawful aid to a retailer.

4. 27 C.F.R. § 6.99 reads as follows:

> Stocking, rotation and pricing service.
>
> Industry members may, at a retail establishment, stock, rotate and affix the price to distilled spirits, wine, or malt beverages which they sell, provided products purchased from other industry members are not altered or disturbed. The rearranging or resetting of all or part of a store or liquor department is not hereby authorized.

STATEMENT OF THE CASE

Stein is engaged in the distribution of beer and wine in southwest Idaho. In the competitive environment which exists in that geographic area with respect to beer and wine distribution, Stein and some of its competitors, with the permission of a retailer, regularly supply certain services incident to their sale of beer and wine at no cost to that retailer. Specifically, Stein did not contest before the BATF that its

trained personnel sold beer and wine through the presentation of market analyses and schematics providing for the display of all beer and wine products, respectively, sold to the retailers. Once presented with such a schematic by Stein, a retailer could (and sometimes would) adopt that schematic for the display of beer or wine, or both, after making whatever space allocation adjustments it believed to be desirable in the context of its overall sales strategy. Then, with the retailer's permission, Stein would set, remove, replace, reset or relocate the beer or wine on the shelves of that retailer in accordance with the schematic. Any particular schematic could thereafter be abandoned at the will of the retailer, who could and often did adopt the schematic of another distributor or put in place its own schematic.

The BATF, after initially challenging Stein's conduct above with respect to beer *and* wine and prevailing before an administrative law judge on both, determined that Stein's marketing techniques described above with respect to beer were fully lawful. App. B, *infra*, 25a-26a. Stein's conduct at issue here, therefore, is limited to its services with respect to wine. Those services are expressly authorized by Idaho statute:

> [A] distributor [of wine] may, with the permission of the retailer, and in accordance with space allocations directed by the retailer, set, remove, replace, reset or relocate all wine upon the shelves of the retailer.

Idaho Code § 23-1325A (Supp. 1985).[2] As the court below candidly acknowledged,

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[2] This statute was enacted by the Idaho legislature in 1984

> [t]he Idaho legislature clearly intended to permit wholesalers to remove another wholesaler's wine from the retailer's shelves and to relocate *all* wine upon the shelves with the retailer's permission.

App. A, *infra*, 4a, 779 F.2d, at 1410.

In addition, Stein's conduct at issue here is fully authorized, except in one respect, by pertinent federal law, § 5(b)(3) of the Federal Alcohol Administration Act ("FAAA"), 27 U.S.C. § 205(b)(3), as interpreted and implemented by BATF regulations, 27 C.F.R. § 6.99. As the court concluded, § 6.99

> permits wholesalers to rotate, stock, and price the [wine] products they sell to the retail store, provided that the [wine] products of other wholesalers are not disturbed.

App. A, *infra*, 4a, 779 F.2d, at 1410.

Thus, the actual conduct engaged in by Stein in pursuing its competitive marketing strategy for the distribution of beer and wine is expressly authorized by the law of Idaho and is fully authorized by BATF regulations except that, by BATF regulation, Stein may not disturb the wine products of its competitors. Because Stein did so, the BATF drew the legal conclusion that Stein's conduct had violated § 5(b)(3) of the FAAA, 27 U.S.C. § 205(b)(3), which prohibits a distributor from inducing retailers to purchase the distributor's products to the exclusion of the products

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with the specific purpose of overruling a contrary interpretation of *Idaho Code* § 23-1325 by the administrative law judge in this case. App. B, *infra*, 23a-26a. References to § 23-1325A herein should generally be regarded as references to § 23-1325 also.

of other distributors by providing "thing[s] of value" to retailers.

There was no evidence adduced in the administrative proceeding below that any services were provided by Stein pursuant to an understanding or agreement with a retailer to purchase wine (or beer) exclusively from Stein. The BATF's conclusion was reached notwithstanding that the administrative law judge found, App. C, *infra*, 67a, and the BATF affirmed, App. B, *infra*, 29a, that "the retailers did not understand the nature of the alleged inducements." Nevertheless, the BATF ordered that Stein's basic federal permits issued pursuant to the FAAA be suspended for a period of seven days, to run concurrently. The practical effect of this suspension would be to shut down Stein's business for a full week.[3]

Stein thereafter filed a petition for review of the BATF's decision in the Ninth Circuit. Stein argued to the Ninth Circuit that the BATF's decision was incorrect as a matter of law because Stein's conduct was not within the purview of the FAAA. Stein placed principal reliance in support of this argument on *National Distributing Co.* v. *U.S. Treasury Department*, 626 F.2d 997 (D.C. Cir. 1980), in which the D.C. Circuit held broadly that the provision by a wholesaler of a "thing of value" to all retailers on an equal basis and not conditioned on any type of agreement or understanding that the retailer would purchase ex-

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[3] The administrative law judge initially ordered Stein's basic permits be suspended for 45 days, App. C, *infra*, 86a, but the BATF, on review, lowered that figure to seven days "in light of [its] determination to modify the ALJ's decision regarding Stein's activities concerning malt beverages . . . ." App. B, *infra*, 37a.

clusively from that wholesaler could not be regarded as a violation of the FAAA. 626 F.2d, at 1020.

Stein also argued that its conduct at issue—the provision of services to consenting retailers in the form of resetting of wines, including the wines of Stein's competitors—was constitutionally insulated from federal regulation under the Twenty-first Amendment because it was *expressly* authorized by an Idaho statute. Stein placed principal reliance for this argument on two decisions of the Fifth Circuit which struck down as unconstitutional two BATF regulations as being preempted by Florida law. *Wine Industry of Florida, Inc.* v. *Miller*, 609 F.2d 1167 (5th Cir. 1980) (Florida statute authorizing, *inter alia*, a distributor's handling and movement of a competitor's wine in retail establishment conflicts with and preempts contrary BATF rule); *Castlewood International Corp.* v. *Simon*, 596 F.2d 638 (5th Cir. 1979) (Florida law permitting distributor to negotiate with retailer price below distributor's cost if price offered equally to all retailers conflicts with and preempts contrary BATF rule), *vacated and remanded*, 446 U.S. 949, *reinstated*, 626 F.2d 1200 (5th Cir. 1980).

The Ninth Circuit, without discussion or citation to *National Distributing*, rejected Stein's argument that the FAAA could not be interpreted to reach its conduct in this case. App. A, *infra*, 9a, 779 F.2d, at 1412. With respect to Stein's Twenty-first Amendment argument, the court held that the Idaho statute at issue did not involve the *distribution* of alcoholic beverages and therefore was not an exercise of a "core power" which would have required the federal policy to give way. App. A, *infra*, 6a, 779 F.2d, at 1410. The court also held that the generalized federal

interest "in preventing wholesaler dominion and control over retail outlets should prevail over the less substantial state interest," *id.*, at 6a, 779 F.2d, at 1411.

In the alternative, the court reasoned that there was no conflict between the Idaho law and federal policy at issue because the Idaho law, although it expressly authorized Stein's conduct, did not "*require*" that conduct. App. A, *infra*, 7a, 779 F.2d, at 1411. The Ninth Circuit recognized that its decision could not be reconciled with the views of the Fifth Circuit on both of these points and accepted the BATF's position that the Fifth Circuit's decisions in *Wine Industry* and *Castlewood* had been wrongly decided. *Id.*, at 9a, 779 F.2d, at 1411.

THE QUESTIONS ARE SUBSTANTIAL

A. The Nullification of the Sovereign Power of Idaho, Under the Twenty-first Amendment, To Establish and Regulate the Distribution of Wine Within Its Borders Advances No Comparable Federal Interest.

Although there is "no bright line between federal and state powers over liquors" under the Twenty-first Amendment, this Court has never doubted that "[t]he Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor *and how to structure the liquor distribution system.*" *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980) (emphasis added). The State of Idaho has enacted a comprehensive scheme regulating the distribution system for alcoholic beverages within its borders. *See generally* Idaho Liquor Act, *Idaho Code* §§ 23-101 *et. seq.* The Idaho Liquor Act constitutes in many respects (and in all respects pertinent

to this case) Idaho's exercise of what this Court has repeatedly characterized as a "core power" reserved to the States by the Twenty-first Amendment, that of structuring their liquor distribution systems. *Capital Cities Cable, Inc.* v. *Crisp*, No. 82-1795 (June 18, 1984), slip op., at 20-21, 104 S. Ct. 2694, 2709 (1984).

In the course of structuring Idaho's liquor distribution system, the Idaho legislature has specifically chosen to regulate the relationships between distributors such as Stein and retailers so as to prevent distributors (and others similarly situated) from gaining control over retailers.[4] The court below observed that Idaho's comprehensive statutory scheme, and specifically the Idaho statutes governing the relation-

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[4] Idaho's comprehensive statutory scheme is found in Title 23 of the Idaho Code. Title 23 creates a state liquor dispensary, which is part of the Office of the Governor. *Idaho Code* § 23-201. The dispensary is empowered to regulate the liquor industry and to run state controlled liquor stores, Idaho being one of the States in which alcoholic beverages, except for beer and wine, may only be sold in state stores. *Idaho Code* § 23-203. The statute also creates an extensive permit system operated by the State's Department of Law Enforcement and the Alcoholic Beverage Control Bureau. *See, e.g., Idaho Code* §§ 23-903, 23-1003 & 23-1306.

Chapter 10 of Title 23 contains comprehensive and detailed regulations governing the manufacture, distribution and sale of beer. Its counterpart for wine is found in Chapter 13. Sections 1325 and 1325A of Chapter 13, *Idaho Code* §§ 23-1325 and 23-1325A, the provisions at issue in this case, prevent distributors and manufacturers from gaining control over a retailer. This objective is achieved by preventing wholesalers and manufacturers from acquiring a financial interest in a retailer and by preventing the provision to retailers of discounts, equipment and signs, or "any other thing of value" by distributors and manufacturers. *Idaho Code* § 23-1325(1).

ships between wine distributors and wine retailers, were "modeled on the . . . tied house provision" of 5(b) of the FAAA, 27 U.S.C. § 205(b). App. A, *infra*, 8a, 779 F.2d, at 1412. Under both statutes, a distributor may not furnish to a retailer "equipment, fixtures, signs, supplies, money services, or other thing of value . . . ."

In this case, the "thing of value" allegedly furnished by Stein and ultimately found by the BATF to support its finding of a violation of § 205(b) of the FAAA was the furnishing of schematics and labor which had the incidental effect of disturbing the wine of Stein's competitors with, of course, the approval of the retailer. As indicated above, however, the Idaho legislature expressly determined that the provision of such services was in the public interest and did not constitute the provision of a "thing of value."

This determination by the Idaho legislature is virtually indistinguishable from action taken by the Florida legislature in response to a predecessor regulation of the BATF, ATF 77-4. That regulation, like 27 C.F.R. § 6.99, prohibited, *inter alia*, a distributor's altering or disturbing in any way the wine sold by another distributor. *Wine Industry of Florida, Inc.* v. *Miller*, 609 F.2d, at 1168 n.3. The Florida legislature, after the promulgation of ATF 77-4, enacted *Fla. Stat. Ann.* § 561.424, which expressly authorized all of the conduct prohibited by ATF 77-4, including the handling and movement of a competitor's wine. 609 F.2d, at 1169.

On appeal from a judgment of the district court upholding ATF 77-4 against a facial constitutional challenge based on the Twenty-first Amendment and the Florida statute, the Fifth Circuit flatly declared

ATF 77-4 to be preempted and, therefore, unconstitutional. 609 F.2d, at 1170. In holding ATF 77-4 unconstitutional, the Fifth Circuit relied upon and followed its earlier decision in *Castlewood International Corp.* v. *Simon*, 596 F.2d 638 (5th Cir. 1979).

In *Castlewood*, the Fifth Circuit squarely held another BATF regulation, ATF 74-6, to be preempted under the Twenty-first Amendment by a Florida statute which permitted a distributor and retailer to negotiate a price below the distributor's cost, so long as the negotiated price was then offered by that distributor "fairly and equally" to all retailers. 596 F.2d, at 640. Here, the BATF has never alleged that Stein did not offer its stocking services on an equal basis to all interested retailers.

In ATF 74-6, on the other hand, the BATF interpreted § 205(b)(3) of the FAAA generally to prohibit the selling of liquor by a distributor to retailers at below cost. Observing that, as here, the State had comprehensively sought to regulate alcoholic beverages and that the exercise of the State's sovereign power involved only the relationship between distributors and retailers in Florida, the Fifth Circuit held ATF 74-6 unconstitutional under the Twenty-first Amendment as preempted by the pertinent Florida statute. 596 F.2d, at 643. In so holding, the Fifth Circuit found the Florida statute to be in conflict with the challenged BATF regulation, a holding discussed *infra*, pp. 19-20, and determined that "[n]o interest of sufficient magnitude is advanced in support of" the BATF regulation. 596 F.2d, at 643.

The Solicitor General thereafter petitioned for a writ of certiorari, arguing, *inter alia*, that the subordination of ATF 74-6 to the Florida statute "could

have a significant impact on the enforcement of the Federal Alcohol Administration Act and other federal statutes affecting the liquor industry."[5] This Court granted that petition, vacated the judgment and remanded the case "for further consideration in light of *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*" 446 U.S. 949 (1980). On remand, the Fifth Circuit reconsidered its prior decision in light of *Midcal*, and concluded once again "that no federal interests of sufficient magnitude exist in support of ATF Ruling 74-6 to outweigh the state interests" involved. *Castlewood International Corp.* v. *Miller*, 626 F.2d 1200, 1201 (5th Cir. 1980). It therefore reinstated its prior opinion.

The Ninth Circuit's decision in this case did not purport to be consistent, and cannot be reconciled, with the Fifth Circuit's decisions in *Wine Industry* or *Castlewood*. Nor has the BATF, since the decisions in those cases, modified its regulations so as to blunt the force of the Fifth Circuit decisions or to ameliorate the square conflict between the Idaho statute at issue here and the BATF regulation involved.[6] The

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[5] *Miller* v. *Castlewood International Corp., vacated and remanded*, 446 U.S. 949 (1980) (pet. for cert. of Secretary William G. Miller, Department of the Treasury, at 16).

[6] If anything, the conflict here is more sharply presented than in *Wine Industry*. In *Wine Industry*, the Florida legislature enacted broad legislation which, under the decision in *Wine Industry*, swept away all of the restrictions on distributors and retailers then found in ATF 77-4. *See* 609 F.2d, at 1168-69 & nn.3-6. Here, the Idaho legislature focused with particularity on the single prohibition—the disturbing of the wine of another distributor—which constitutes the only act of appellant supporting the suspension order issued by the BATF. Where, as here,

federal interest in preventing all distributors from moving the wines of their competitors (and vice versa) in the context of allowing such marketing practices with respect to the distribution of beer is manifestly insubstantial and of considerably less weight than the federal interests found in *Wine Industry* and *Castlewood* to be insufficient to overcome Florida's interests in regulating the distribution of wine.

This issue, in the Government's own statements to this Court, is one having "profound" implications for the ongoing interactions between the States and the federal government as regards the regulation of alcoholic beverages.[7] If the Idaho statute does not involve the exercise of a "core power" under the Twenty-first Amendment, that term would appear to have no content. In any event, Idaho's interest in regulating the distribution of wine within its borders in a comprehensive, coherent fashion outweighs whatever federal interest there may be in attending to the minutiae of wine distribution in Idaho.

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beer and wine are distributed and retailed together, it blinks reality to suggest that any significant federal interest is advanced by prohibiting a distributor's movement of a competitor's wine; in any event, the federal interest involved in *Wine Industry* was more substantial than the interest now preserved in 27 C.F.R. § 6.99 and advanced by the BATF in this case, because the BATF regulation struck down there sought to regulate more comprehensively than does § 6.99.

[7] *Miller* v. *Castlewood International, Inc.*, 446 U.S. 949 (1980) (pet. for cert. of Secretary William G. Miller, Department of the Treasury, at 29).

B. The Theory Under Which the Ninth Circuit Found No "Conflict" Between the Idaho Statute and the Federal Interest Assertedly Involved in This Case Would Nullify Most of the Authority Conferred on the States By the Twenty-first Amendment.

The decision below does more than denigrate the role of the legislatures of the States in regulating the distribution of alcoholic beverages within their borders by overriding the considered judgment of the Idaho legislature. It also adopts a view of the Twenty-first Amendment which drastically alters the relationship between the States and the federal government by denying altogether the applicability of the Twenty-first Amendment unless the private conduct sought to be regulated by the federal government is *mandated* by state law rather than, as here, expressly authorized by state law. As Stein will demonstrate below, this novel theory of "conflict" in Twenty-first Amendment jurisprudence is unsupported by any decision of this Court and was squarely rejected by the Fifth Circuit's decisions in *Castlewood* and *Wine Industry*.

1. The decision below effectively repeals the Twenty-first Amendment with regard to the authority of the States over the distribution of alcoholic beverages within their borders.

The court below held, in addition to its holding that *Idaho Code* § 23-1325A must fall, that no "conflict" between the relevant policy of Idaho (explicitly enacted by its legislature) and the federal policy (asserted by the BATF to be involved) was presented and that, therefore, the Twenty-first Amendment was essentially irrelevant to this case. App. A, *infra*, 6a-9a, 779 F.2d, at 1411-12. That holding was based on

the proposition that "Idaho does not *require* wholesalers to reset the wine shelves of retailers." *Id.*, at 7a, 779 F.2d, at 1411. Absent such a requirement, reasoned the court, there could be no conflict because Stein could have foregone the exercise of its clear legal right under Idaho law to provide full servicing of the wine displays of consenting retailers.

In reaching this conclusion, the Ninth Circuit appeared to rely most heavily on this Court's decision in *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U.S. 35 (1966). In that case, the plaintiffs had challenged a New York law which imposed on liquor wholesalers and retailers *mandatory* requirements related to pricing.[8] Because the state statute challenged in *Seagram* imposed a mandatory requirement, *Seagram* presented no occasion for this Court to address the question whether a state statute expressly authorizing private conduct might somehow not be in "conflict" with a federal rule asserted to prohibit such conduct. The *Seagram* Court also did not express any opinion on this specific issue by way of *dictum*. The "conflict" analysis employed by the Ninth Circuit seeks to destroy, rather than preserve, the state statute at issue, a result not countenanced by this Court's cases.[9]

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[8] This Court presently has *sub judice* the question of the constitutionality of that same New York "price affirmation" statute, as amended subsequently to this Court's decision in *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U.S. 35 (1966). *Brown-Forman Distillers Corp.* v. *State of New York Liquor Authority*, No. 84-2030, *prob. juris. noted*, 106 S. Ct. 55 (1985). For reasons discussed in the text following, neither *Brown-Forman* nor *Seagram* present this "conflict" issue, nor does *324 Liquor Corp.* v. *McLaughlin*, No. 84-2022, *prob. juris. noted*, Mar. 24, 1986.

[9] The limited analysis of the court below and its citation to

This holding of the Ninth Circuit, if sustained, would have a significant impact on the authority of the States, as recognized repeatedly by this Court, to control the distribution of alcoholic beverages within their respective borders. Under it, States would be unable to shape, through a combination of mandatory and permissive measures, a coherent system of distribution. In effect, the holding of the Ninth Circuit would place the States in exactly the same position, vis-a-vis Congress, with regard to regulating private conduct involving the distribution of liquor as they presently are with respect to regulation of all other forms of private economic activity which are otherwise subject to federal power under the Commerce Clause: once Congress acts within its power, a contrary state policy must give way.

The decision below, in short, returns the law to the pre-Twenty-first Amendment days in which "alcohol was for constitutional purposes treated in the abstract

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Seagram, 384 U.S., at 45, in support of its holding reflects confusion between the establishment of a conflict between state and federal law for purposes of triggering scrutiny under the Twenty-first Amendment—the issue herein—and the existence of a conflict between state and federal laws sufficient to trigger scrutiny under the Supremacy Clause. Remarkably, the Ninth Circuit's decision goes one step further by ignoring the central tenet of this Court's decisions under the Supremacy Clause: that Congress will not be assumed to have preempted state law unless it has done so expressly, *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977), or has so occupied a field of regulation that it has "left no room for the States to supplement" federal law. *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). As discussed in the text following, this holding, if permitted to stand, would effect a substantial diminution of the authority of the States over the importation and distribution of alcoholic beverages within their respective borders.

as an article of commerce just like peanuts and potatoes." *United States* v. *Frankfort Distilleries, Inc.*, 324 U.S. 293, 300 (1945) (Frankfurter, J., concurring). Instead of retaining, in light of the Twenty-first Amendment, "*some* Commerce Clause authority over liquor," *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S., at 108 (emphasis added), the federal government would become all powerful in this field except perhaps to the extent that the States chose to assume total control of their in-state distribution systems by removing them from the private sector. *But cf. Garcia* v. *San Antonio Metropolitan Transit Authority*, No. 82-1913 (Feb. 19, 1985), 105 S. Ct. 1005 (1985). If this decision of the Ninth Circuit stands, then the chief lesson of prohibition which led to the Twenty-first Amendment's conferral of substantial autonomy on the States will be largely forgotten:

> Congress . . . as a practical matter, . . . cannot impose uniform national standards relating to the local sale . . . of a product that arouses the strong emotions that attend the use of alcoholic beverages; these matters are appropriately left to state regulation.[10]

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[10] *Miller* v. *Castlewood International Corp.*, 446 U.S. 949 (1980) (pet. for cert. of Secretary William G. Miller, Department of the Treasury, at 20). The reach of the BATF's assertion of power over the trivia of alcohol distribution *within* the several States and the impact of the decision below on the BATF's assertion is illustrated by the policies of Florida and of California, Massachusetts, Illinois, Texas, and Wisconsin set out in notes 13 and 14, *infra*. Those state policies would be presumptively invalid under the Ninth Circuit's decision in this case.

2. The decision below is in square conflict with decisions of the Fifth Circuit.

As the court below acknowledged, its decision on this point is in square conflict with the Fifth Circuit's decisions in *Castlewood* and *Wine Industry*. App. A, *infra*, 9a, 779 F.2d, at 1412.[11] In *Castlewood*, the Fifth Circuit held a conflict between the pertinent state law and the BATF rule to exist based upon a decision of the Supreme Court of Florida that Florida law did not prohibit the particular conduct involved. 596 F.2d, at 641. Under that holding, which was not implicated by this Court's decision in *Midcal* and which, therefore, was not implicated in this Court's action in vacating and remanding *Castlewood*,[12] the Fifth Circuit's holding in *Wine Industry* followed *a fortiori* because there, as in this case, the federal policy conflicted with an affirmative state statute *expressly* authorizing the conduct assertedly prohibited by federal rule. In this case, Idaho's intent to preempt the BATF's as-

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[11] The Ninth Circuit's holding is also inconsistent with that court's prior position in *Washington Brewers Institute* v. *United States*, 137 F.2d 964, 968 (9th Cir.) ("By the terms of [the Twenty-first Amendment] the national government has disabled itself from prosecuting as an offense that which a state has commanded *or implicitly encouraged* as a means of controlling the traffic in intoxicants within its borders.") (emphasis added) (dictum), *cert. denied*, 320 U.S. 776 (1943).

[12] *Castlewood* was vacated and remanded for reconsideration in light of this Court's decision in *Midcal*. *See* note 5 and accompanying text, *supra*. In *Midcal*, the challenged California statute *mandated* the conduct ultimately held by this Court to be prohibited by the Sherman Act, 15 U.S.C. §§ 1 *et seq*. Thus, *Midcal* presented no occasion for the Court to address the Government's novel "conflict" argument, nor any basis for the Fifth Circuit's reconsideration of its decision on that point on remand.

sertion of jurisdiction over Stein's conduct could not be clearer.

If the several States are engaging in futile exercises by legislating in the manner of the Idaho legislature, this Court should make that clear. If, as appellant argues, the decision below is incorrect, then the States located in the Ninth Circuit, including Idaho and California,[13] should be freed from the constraints of the decision below and placed on an equal footing with their sister States, including Florida, Illinois Wisconsin, Texas and Massachusetts.[14]

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[13] California expressly permits wine tapping accessories to be loaned to retailers by wholesalers. Title 4, ch. 1, Rule 106, Cal. Admin. Code, App. E, *infra*, 97a. The BATF, on the other hand, only allows such accessories to be sold. 27 C.F.R. § 6.89. This California policy is presumptively invalid under the decision below. This California rule, in the context of California's overall regulatory scheme for controlling the distribution of alcoholic beverages within its borders, illustrates the comprehensiveness of regulatory schemes of the several States governing the *distribution* of alcoholic beverages within their respective borders which are protected from interference from the federal government. The interests of the States, of course, goes beyond the interest of a particular State in a particular aspect of its alcohol regulatory scheme—here Idaho's interest in permitting the simultaneous servicing by distributors of the beer *and* wine displays of retailers. The larger interest of the States is in being permitted to construct a comprehensive regulatory scheme suited to the needs and desires of its citizens; under the Twenty-first Amendment, Congress was denied its normal power under the Commerce Clause to impose national uniformity on such matters, as indicated by the statement of the Solicitor General to this Court quoted in the text at note 10, *supra*.

[14] Massachusetts permits liquor wholesalers to sell their products on sixty-day credit. *Mass. Gen. Laws Ann.*, ch. 138, § 25. The BATF, by regulation, limits extensions of credit to thirty

C. Whether Congress, in Enacting the Federal Alcohol Administration Act, Intended to Regulate the Marketing Practices of Appellant Presents a Substantial Question on Which the Courts of Appeals Are in Disagreement.

The decision below dismissed, in a single paragraph, Stein's contention that Congress did not intend, in enacting the "tied-house" provision of the FAAA, 27 U.S.C. § 205(b), to prohibit the marketing practices admittedly engaged in by Stein. App. A, *infra*, 9a, 779 F.2d, at 1412. In doing so, the Ninth Circuit ignored this Court's teaching that when Congress legislates "in a field which the States have traditionally occupied," the courts are, in approaching a preemption question, to "start with the assumption that the historic powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice* v.

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days. 27 C.F.R. § 6.65. This policy of Massachusetts is, of course, unaffected by the decision below because Massachusetts is not in the Ninth Circuit. Illinois, by statute, expressly authorizes a distributor to provide a retailer "one outside sign, per brand . . . costing not more than $500 . . . ." *Ill. Rev. Stat.*, ch. 43, § 123. *See also* Wis. Stat. § 125.69(2)(b) (provision of outdoor signs expressly authorized.) The BATF, in the other hand, takes the position that any such sign constitutes a prohibited "thing of value." 27 C.F.R. § 6.46;4 *Texas Code Ann.* § 102.07(b) (wholesalers may provide incidental advertising specialties without aggregate limitation even though items not furnished to general public, contrary to 27 C.F.R. §§ 6.85 & 6.87). As discussed in note 13, *supra*, these policy decisions are presumptively within the power of the States to make if the Twenty-first Amendment is given any force; that Amendment simply does not permit the federal government to become immersed in the sea of trivial detail of regulation of the distribution of alcohol where a State, like Idaho, has itself enacted a comprehensive regulatory scheme.

Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).[15] Thus, even in the absence of the special deference due to the States under the Twenty-first Amendment, the Ninth Circuit's conclusion that the generalized federal interest embodied in the FAAA sufficed to strike down Idaho's express policy is in error.

Even setting aside the special considerations warranted by the Twenty-first Amendment and the preemption principles espoused and applied by this Court in cases such as *Hillsborough County, Florida* v. *Automated Medical Laboratories, Inc.*, No. 83-1925 (June 3, 1985), 105 S. Ct. 2371 (1985), the decision below is incorrect in concluding that Congress intended those distributing beer and wine to be subject to suspension of their federal alcohol permits for providing servicing to retailers with respect to wine under the circumstances present here.

The plain language of § 205(b) of the FAAA, with which this inquiry must begin, *see Park 'n Fly, Inc.* v. *Dollar Park & Fly, Inc.*, No. 83-1132 (Jan. 8, 1985), 105 S.Ct. 658 (1985), does not expressly address the provision of such services by distributors to retailers of wine. Furthermore, violation by Stein of the applicable regulation, 27 C.F.R. § 6.99, is insufficient to support the decision of the BATF under the construction given the FAAA by the D.C. Circuit in *National Distributing Co.* v. *U.S. Department of the Treasury*, 626 F.2d 997 (D.C. Cir. 1980).

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[15] This basic tenet of this Court's Supremacy Clause jurisprudence has special force where, as here, the police power of the States has been expressly preserved by the Twenty-first Amendment from interference by Congress's exercise of its Commerce Clause authority.

In *National Distributing*, the National Distributing Company ("National") made Lancers wine available at below cost on an equal basis to all retailers in its area, "without discrimination, with no conditions, restrictions, or quantity limitations . . . ." *Id.*, at 1000. As a result of these below-cost sales, "several retailers that formerly had purchased Lancers wine from both National and [a competitor] purchased their supplies solely from National." *Id.* The BATF determined that National had violated the "tied-house" provision of the FAAA, 27 U.S.C. § 205(b), apparently arguing that the below-cost sales constituted the giving by National of an "other thing of value" under § 205(b)(3). 626 F.2d, at 1004.

The D.C. Circuit, after an exhaustive discussion of the language and legislative history of the FAAA, reversed the BATF. Noting that, as here, "[t]here is no suggestion in the record that National's price cutting was related to a scheme of tying sales, quota sales, exclusive outlets and the like . . . ," *id.*, that court held that National's price cutting could be prohibited by the FAAA only if it were "coupled with an agreement or understanding that a retailer will buy other products of the wholesaler . . . to the exclusion of competitors, or when [such price cutting leads] to domination and control of a retail outlet by the wholesaler . . . ." *Id.*, at 1020.[16]

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[16] It is clear from the D.C. Circuit's extended discussion of the legislative history of § 205(b) that it viewed the term "domination and control" as quoted in the text above as a form of vertical integration resulting from the imposition on the retailer of a "condition" or "agreement" to purchase exclusively from the distributor. Here, as in *National Distributing*, some retailers were found to have switched their allegiances as the result of

Applying the reasoning of *National Distributing*, Stein could not have been found to have violated the tied-house provision of the FAAA. The provision of "extensive services" in an effort to sell one's product is not conduct specifically prohibited by § 205(b), nor is it even analogous to proscribed conduct expressly identified in § 205(b). 626 F.2d, at 1004. The services did not constitute the imposition of "exclusive contracts or exclusive agencies upon formerly independent retailers." *Id.*, at 1011. The services were not conditioned or tied to any agreement or understanding, express or implied, concerning future sales. *Id.*, at 999. Stein provided no financial aid to the retailers, and it did not achieve a financial interest in any of the retailers. *Id.*, at 1004. The services were provided on an equal basis to all retailers in the market area. *Id.*, at 1020. The BATF made no attempt to prove that Stein unlawfully monopolized the market. *Id.*, at 1017 & n.64. Nor did Stein impose a form of vertical integration on the retailers through the purchase of "control or exclusive selling rights from ostensibly independent retailers in need of financial assistance." *Id.*, at 1010. Moreover, the Director credited the testimony of each of the retailers in which they stated that they received no inducements from Stein. App. B, *infra*, 29a.

There is no basis upon which to distinguish *National Distributing* from the case at bar other than

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Stein's (and National's) marketing practices. App. A, *infra*, 8a, 779 F.2d, at 1412. This result, however, is the intended consequence of any competitive marketing practice, as conceded by the BATF in *National Distributing*. 626 F.2d, at 1003 & n.25. Such a result, *without more*, cannot constitute a violation of § 205(b) under the reasoning of *National Distributing*.

to note the Ninth Circuit's refusal to address adequately the issue of statutory construction which, if decided correctly, would have rendered unnecessary its decision to strike down the considered judgment of the Idaho legislature on the point at issue. A rule of national applicability should be established by this Court in this case through resolution of this conflict.[17]

CONCLUSION

The questions presented in this appeal are substantial in their own right and require plenary consideration by this Court in order to resolve the multiple conflicts raised by the Ninth Circuit's decision and the contrary decisions of the Fifth Circuit and the D.C. Circuit. Probable jurisdiction should be noted and the case set for argument.

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[17] Unlike cases such as *Castlewood* and *National Distributing*, which implicate broader federal antitrust policies because of the potential for predatory pricing, the activities of Stein in this case constitute usual and customary practice in the grocery business. The BATF recognized as much:

> The activities alleged in this case to be in violation of the FAA Act are not of the sinister, under-the-table type. The activities were part of and an extension of Stein's aggressive approach to how to succeed in the market. *But unlike an aggressive wholesaler of other food products to a supermarket retail chain*, the wine wholesaler's salesmanship must take into account the strict provisions of the FAA Act.

App. B, *infra*, 29a (emphasis added). *National Distributing*, 626 F.2d, at 1004, left open the possibility that the type of conduct engaged in there could, if it constituted a "subterfuge" designed to create a tied house, come within the sweeps of the FAAA. There is no suggestion in this case that Stein's provision of services respecting wine could be viewed as such a "subterfuge," even assuming that Stein's conduct had not been expressly authorized by the Idaho legislature.

Respectfully submitted,

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APPENDIX

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APPENDIX A

United States Court of Appeals,
Ninth Circuit.

No. 84-7870.

STEIN DISTRIBUTING COMPANY, INC.,
Petitioner,

v.

DEPARTMENT OF THE TREASURY BUREAU OF ALCOHOL, TOBACCO & FIREARMS,
Respondent.

Argued and Submitted Oct. 11, 1985.

Decided Jan. 3, 1986.

Before GOODWIN, ALARCON and POOLE, Circuit Judges.

POOLE, Circuit Judge:

FACTS

Stein Distributing Co., Inc. (Stein) is the largest wholesaler of beer and wine in the Boise, Idaho area. Stein and other wholesalers routinely prepared schematic diagrams for its retail customers, diagramming proposed product arrangements in retailers' beer and wine sections. In addition, Stein provided labor to arrange or "reset" the beer and wine sections in accordance with the schematic diagrams. In the process of providing these services, Stein would often move the wine products of its competitors, as well as its own products.

In August, 1979, an inspector of the Bureau of Alcohol, Tobacco and Firearms (the Bureau) told Stein's president that the services it provided to retailers constituted a violation of the "tied house" provision of the Federal Alcohol Administration Act (the Act), 27 U.S.C. § 205(b)(3) (1982).[1] In January, 1981, Stein was again informed that the Bureau considered its actions to be a violation of federal law. On October 28, 1982, the Bureau issued an order to show cause, charging violations by Stein of the tied house provision and implementing regulations. The Bureau alleged that Stein violated the Act by providing "things of value" to retailers which induced them to purchase wine and beer sold by Stein to the exclusion of similar products sold by other wholesalers. The "things of value" provided by Stein were the furnishing of schematic diagrams and the labor necessary to reset retailers' entire beer and wine sections, including the labor to reset the products of Stein's competitors. At a hearing in February 1983, an Administrative Law Judge determined that the Bureau had proven these allegations with respect to three retail chains.

On petition for review, the Director of the Bureau examined the administrative record and found that the record supported the ALJ's findings. However, the Director modified the portion of the ALJ's decision that held that Stein's beer wholesaling activities violated federal law. The Director noted that under 27 U.S.C.§ 205(f) (1982), the

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[1] The tied house provision of the Act, 27 U.S.C. § 205(b) (1982), was designed to prevent producers, importers, and wholesalers from engaging in certain practices that might induce retailers to purchase products "to the exclusion in whole or in part" of products from other producers, importers, and wholesalers in interstate commerce, where the "direct effect of such inducement is to prevent, deter, hinder or restrict other persons from selling or offering for sale any such products to such retailer in interstate or foreign commerce * * * *" *Id.* § 205(b). Stein's permits were suspended for violations of § 205(b)(3) of the Act, which prohibits wholesalers from providing "thing[s] of value" to retailers when such action has the effect of inducing retailers to exclude the products of other wholesalers.

prohibitions of the tied house provision apply in cases involving beer only to the extent that state law imposes restrictions similar to those of federal law regulating transactions between wholesalers and retailers. Because the Director determined that Stein's conduct did not violate Idaho law, he concluded that the Bureau lacked jurisdiction under section 205(f) with respect to Stein's activities concerning beer. In addition, the Director reduced the suspension of Stein's permits from forty-five days to seven days. Stein now appeals that suspension. We affirm the Director's order.

DISCUSSION

I.

Stein argues that it has a right by virtue of the Twenty-first Amendment[2] to perform the services in question because such conduct is expressly authorized by Idaho law. In order to assess this argument, it is necessary to examine the Twenty-first Amendment and the federal and Idaho statutes that regulate wholesalers of alcoholic beverages.

Under section 2 of the Twenty-first Amendment, the states enjoy broad powers to regulate the importation and use of alcoholic beverages within their borders. *Capital Cities Cable, Inc. v Crisp*,__ *U.S.*___, 104 S.Ct. 2694, 2707, 81 L.Ed.2d 580 (1984). The primary effect of the amendment is to create an exception to the normal operation of the Commerce Clause. *Craig v. Boren*, 429 U.S. 190, 206, 97 S.Ct. 451, 461, 50 L.Ed.2d 397 (1976). Although the federal government retains Commerce Clause authority to

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[2] The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

U.S. Const. Amend. 21, § 2.

regulate interstate commerce in liquor, *Capital Cities*, 104 S.Ct. at 2707, the Commerce Clause must "be considered in the light of the [Twenty-first Amendment], and in the context of the issues and interests at stake in any concrete case." *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332, 84 S.Ct. 1293, 1298, 12 L.Ed.2d 350 (1964).

The statutes at issue in this case are the tied house provision of the Act, 27 U.S.C. § 205(b)(3) (1982), Bureau regulation 27 C.F.R. § 6.99 (1985), and Idaho Code §§ 23-1325, 23-1325A (Supp.1985). The regulation permits wholesalers to rotate, stock, and price the liquor products they sell to the retail store, provided that the liquor products of other wholesalers are not disturbed. The rearranging or resetting of all or part of a retail store is not authorized. 27 C.F.R. § 6.99 (1985). In its discussion of this regulation, the Bureau emphasized that a wholesaler "is prohibited from disturbing products sold by another [wholesaler], or from resetting an entire store or liquor department," Supplemental Information, 45 Fed.Reg. 63241, 63248 (1980) (codified at 27 C.F.R. § 6.1-11.46).

As in federal law, Idaho law prohibits wholesalers from providing things of value to retailers, except as expressly permitted by the statute itself. Idaho Code § 23-1325 (Supp.1985). In contrast to federal law, Idaho law does not require that any particular adverse effect flow from the provision of a "thing of value." In addition, the Idaho law expressly permits wholesalers, with the permission of the retailer, to reset all wine upon the retailers' shelves. *Id.* § 23-1325A. The Idaho legislature clearly intended to permit wholesalers to remove another wholesaler's wine from the retailer's shelves and to relocate *all* wine upon the shelves with the retailer's permission. *Id.* (Legislative statement of purpose.)

II.

Stein argues that its conduct is protected from federal prohibitions because it is expressly authorized by Idaho

law. The Supreme Court has decided, however, that a state has "virtually complete" control only over interests that engage the "core powers" reserved to the states by the Twenty-first Amendment—"that of exercising 'control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.' " *Capital Cities,* 104 S.Ct. at 2709 (quoting *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.,* 445 U.S. 97, 110, 100 S.Ct. 937, 945, 63 L.Ed.2d 233 (1980).

The Idaho statute permitting wholesalers to reset retailers' wine sections involves neither the state interest in controlling the importation of liquor into the state nor the state interest in structuring the liquor distribution system. The statute is wholly permissive and merely exempts specific restocking activities from a strict state prohibition against wholesalers providing "thing[s] of value" to retailers. Cases upholding state statutes as involving Twenty-first Amendment "core powers" have involved more significant state interests than the ones at issue. *See, e.g., Midcal,* 445 U.S. at 107 & n. 10, 100 S.Ct. at 944 & n. 10 (states may prohibit the importation of liquor entirely); *Ziffrin, Inc. v. Reeves,* 308 U.S. 132, 60 S.Ct. 163, 84 L.Ed. 128 (1939) (upholding state statute prohibiting a domestic manufacturer of liquor from delivering his product to an unlicensed private carrier); *Indianapolis Brewing Co. v. Liquor Control Commission,* 305 U.S. 391, 394, 59 S.Ct. 254, 255, 83 L.Ed. 243 (1939) (upholding Michigan statute prohibiting Michigan dealers from selling beer manufactured in a state which discriminated against Michigan beer),

Moreover, the Supreme Court has determined that state interests more significant than those involved here were nevertheless not "core powers" reserved to the states by the Twenty-first Amendment. In *Capital Cities,* for example, the court held that an Oklahoma ban on televised liquor advertising engaged Twenty-first Amendment core powers "only indirectly," even though the ban was de-

signed to discourage liquor consumption within the state. 104 S.Ct. at 2709. In *Bacchus Imports, Ltd. v. Dias,* ___ *U.S.* ___, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984), the Supreme Court held that a twenty percent Hawaii state tax on liquor sales that exempted locally produced liquor was not supported by any clear Twenty-first Amendment concerns, even though the purpose of the statute was to promote local industry. *Id.,* 104 S.Ct. at 3058-59. These cases suggest that the state interest in allowing wholesalers to restock the wine shelves of retailers is not sufficiently significant to be considered a Twenty-first Amendment "core power." Therefore, we find that the strong federal interest in preventing wholesaler dominion and control over retail outlets should prevail over the less substantial state interest. *Accord Capital Cities,* 104 S.Ct. at 2709 (when a state's "core power" under the Twenty-first Amendment is not directly implicated, "the balance between state and federal power tips decisively in favor of the federal law, and enforcement of the state statute is barred by the Supremacy Clause."). *But cf. Brown-Forman Distillers Corp. v. State Liquor Authority,* 64 N.Y.2d 479, 490 N.Y.S.2d. 128, 479 N.E.2d 764 (New York statutory requirement that liquor distillers affirm that they will not sell liquor to wholesalers in New York state at a higher price than that at which the same item is sold anywhere else in the nation does not violate the Commerce Clause), *prob. juris. noted,* — U.S. —, 106 S.Ct. 55, 88 L.Ed.2d 45 (1985).

III.

Moreover, we find that the Twenty-first Amendment is not implicated because there is no conflict between the Idaho and federal laws. The Supreme Court has emphasized that federal courts should not seek out conflicts between federal and state regulations where none clearly exists. *Joseph E. Seagram & Sons, Inc., v. Hostetter,* 384 U.S. 35, 45, 86 S.Ct. 1254, 1261, 16 L.Ed.2d 336 (1966).

The Supreme Court has said that two tests must be applied to determine whether a conflict exists: A conflict will be found "where compliance with both federal and state regulations is a physical impossibility * * *," *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-43, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963), or where the state "law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941); *Jones v. Rath Packing Co.,* 430 U.S. 519, 526, 540-41, 97 S.Ct. 1305, 1310, 1317, 51 L.Ed.2d 604 (1977). The Ninth Circuit has adopted the Supreme Court's test of conflict. *See Operating Engineers' Local #428 Pension Trust Fund v. Zamborsky,* 650 F.2d 196, 200 (9th Cir.1981).

The statutes involved in this case do not conflict under either of the Supreme Court's standards. Idaho law does not *require* wholesalers to reset the wine shelves of retailers. This is not, therefore, a case where state law compels conduct prohibited by federal law. *Cf. Capital Cities,* 104 S.Ct. at 2709 (state constitution banning all televised liquor advertisements, including advertisements retransmitted by state cable television systems, necessarily conflicted with federal law prohibiting cable operations from altering television signals); *Midcal,* 445 U.S. at 103, 100 S.Ct. at 942 (state statute requiring all wine wholesalers to file fair trade contracts or price schedules in all circumstances violated general antitrust law). In fact, Stein's activities in providing schematic diagrams to retailers and providing labor to reset the retailers' wine sections would not in all circumstances violate the Act. The tied house provision requires a showing that the "thing of value" provided by the wholesaler (including the restocking services prohibited by 27 C.F.R. § 6.99 (1985)) served as an inducement to the retailer to exclude products sold by other wholesalers. Therefore, it would be possible for a wholesaler to comply with both federal and Idaho law by

providing services that do not induce the retailer to exclude the products of other wholesalers. *Cf. Joseph E. Seagram & Sons,* 384 U.S. at 45, 86 S.Ct. at 1261 ("We find no such clear conflict * * * [when state law] imposes no irresistible economic pressure on the appellants to violate [federal law] in order to comply with the requirements of [state law].").

In addition, requiring wholesalers to comply with federal law does not stand as an obstacle "to the accomplishment and execution of the full purposes and objective of" state law. *Zamborsky,* 650 F.2d at 200. The Idaho legislature clearly intended to permit wholesalers to move competitors' products as well as their own products when resetting a retailer's wine shelves. *See* Idaho Code § 23-1325A (Supp.1985) (Legislative Statement of Purpose). Stein, however, admits that Idaho Code sections 23-1325 and 23-1325A were modeled on the federal Act's tied house provision and were designed to prevent some of the evils that led to Prohibition. It would be incongruous to argue, therefore, that the Idaho statute was intended to shield wholesalers from the federal tied house provision. Stein was not penalized merely for the resetting of a retailer's wine shelves; it does not dispute the Director's findings that Stein used its influence to depress the sales of its competitors by moving their products to poor display locations. The Director concluded that Stein, by the offer of extensive services, induced three retail chains to purchase Stein products to the exclusion of other wholesalers' products. This is exactly the type of wholesaler influence that both federal and Idaho law intended to prohibit. Compliance with federal law, therefore, would not obstruct the accomplishment and execution of the full purposes of state law. For these reasons, there is no conflict between Idaho and federal law.

Stein argues that the court should follow two Fifth Circuit decisions invalidating Bureau rulings on Twenty-first Amendment grounds. *Wine Industry of Florida, Inc. v.*

Miller, 609 F.2d 1167 (5th Cir.1980); *Castlewood International Corp. v. Simon*, 596 F.2d 638 (5th Cir.1979), *vacated and remanded*, 446 U.S. 949, 100 S.Ct. 2914, 64 L.Ed.2d 806, *reinstated*, 626 F.2d 1200 (5th Cir.1980) (per curiam). In our view, both *Castlewood* and *Wine Industry* have improperly applied the threshold conflict standard that has been required by the Supreme Court and applied by Ninth Circuit decisions. *See, e.g., Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248, 104 S.Ct. 615, 621, 78 L.Ed.2d 443 (1984); *Zamborsky*, 650 F.2d at 200. The *Wine Industry* panel acknowledged that the *Castlewood* court had not applied the conflict test established by the Supreme Court, but held itself bound by the precedent established in *Castlewood*. *Wine Industry*, 609 F.2d at 1172. This court, however, is not persuaded by the Fifth Circuit decisions and will adhere to the Supreme Court test of conflict.

IV.

Stein raises two additional points in its petition. Stein argues that, in order to be found in violation of the tied house provision of the Act, the Director was required to find that Stein convinced retailers to purchase its products by engaging in conduct specifically prohibited in the Act or other law. Nothing in the language of the statute or in the legislative history of the Act, however, supports this interpretation. *Cf. Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980) ("Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.").

In addition, Stein argues that the Director erred in finding its conduct a willful violation of the Act. See 27 U.S.C. § 204(e), (i) (1982) (permit suspension permissible only is permit holder has wilfully violated a condition of the Act). Stein, however, was informed by the Bureau in 1979 and again in 1981 that its activities violated federal law. Nevertheless, Stein persisted in that conduct until the or-

der to show cause was issued in 1982. These facts are sufficient to support the Director's findings that Stein acted with an intentional disregard of the statute or plain indifference to its requirements. *Arrow Distilleries, Inc. v. Alexander*, 109 F.2d 397, 406 (7th Cir.), *cert. denied*, 310 U.S. 646, 60 S.Ct. 1095, 84 L.Ed. 1412 (1940).[3]

For the forgoing reasons, the Order of the Director of the Bureau is AFFIRMED.

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[3] Stein argues that it did not act willfully because it believe that it had the right, under *Castlewood* and the Twenty-first Amendment, to follow state law rather than federal law. Whatever Stein's beliefs about the appropriate application of federal and state law, it knew that the *Bureau* considered its actions to be a violation of federal law. At a minimum, Stein was indifferent to the requirements of federal law, and this is sufficient to establish willfulness. *See Distilled Brands, Inc. v. Dunigan*, 222 F.2d 867, 870 (2d Cir.1955) (evidence that wholesaler continued to engage in tie-in sales after it had been warned that the government regarded such sales as illegal was sufficient to establish willfulness.

APPENDIX B

UNITED STATES TREASURY DEPARTMENT
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS
WASHINGTON, DC

Bureau of Alcohol, Tobacco and Firearms

DOCKET NO. 309
WESTERN REGION

In the Matter of the Order to Show Cause Why Basic Permit Nos. ID-I-765 and ID-P-2894 of the Respondent Should Not Be Suspended.

Petitioner:
Stein Distributing Company, Inc.
601 North Phillip Street
Boise, Idaho 83701

ORDER OF THE DIRECTOR MODIFYING THE ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION SUSPENDING THE PERMITS AND AFFIRMING THE ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION AS MODIFIED

A petition for Review was timely filed with me by Stein Distributing Company, Inc. (hereinafter Stein), from the September 2, 1983, Initial Decision of Administrative Law Judge (hereinafter ALJ) Kenneth L. Travis, suspending for a period of 45 days Stein's importer and wholesaler basic permits numbered ID-I-765 and ID-P-2894 issued under the Federal Alcohol Administration Act (FAA Act), 27 U.S.C. Chapter 8. I have examined and considered the entire administrative record in the proceeding, including the record of the hearing before ALJ Travis, his Initial Decision, the Petition for Review, briefs filed by the Petitioner and the Government, and the oral agruments before me on April 11, 1984, presented by Petitioner's Attorney, Mr. R. B. Kading, Jr., Boise, Idaho, and Mr. David Brule, Regional Counsel's Office, Bureau of Alcohol, Tobacco and Firearms, San Francisco, California.

I DO HEREBY FIND that, as modified herein, the Initial Decision of the Administrative Law Judge is not of an arbitrary nature, is not without reasonable warrant in fact, and is not contrary to the law and regulations.

BACKGROUND

The FAA Act, 27 U.S.C. § 204(e), provides in relevant part that a basic permit shall, after due notice and opportunity for hearing, be suspended upon a finding that the permittee has willfully violated any of the conditions thereof. Section 204(d) conditions basic permits, among other things, upon compliance with Federal law relating to distilled spirits, wine, and malt beverages.

An Order to Show Cause why its basic permits should not be suspended was issued to Stein on October 29, 1982. The Order to Show Cause contained five counts. Each count charged that Stein provided extensive services to one of five supermarket chains by continuously furnishing

schematic diagrams of the beer and wine sections of the retail stores and the labor necessary to reset the beer and wine sections to conform to the schematics, including stocking, shelving, and routine cleaning of beer coolers, which induced the retailers to purchase wine and malt beverages sold by Stein to the exclusion of similar products offered by Stein's competitors. These activities were charged to violate section 5 of the FAA Act, 27 U.S.C. § 205 (b) (3), and 27 C.F.R. § 6.20. (PL-1.)

On November 22, 1982, Stein filed an answer to the Order to Show Cause in which it denied the allegations in the Order and raised several affirmative defenses. Stein moved for summary judgment on January 19, 1983. (PL-6.) The ALJ denied the motion, after hearing oral argument, except as to the contention that the violations, if any, occurring before November 1, 1979, were barred by the 3-year statute of limitations imposed by 27 U.S.C. § 204(i).

A hearing on the Order to Show Cause was held before ALJ Travis on February 1, 1983 through February 10, 1983, in Boise, Idaho. At the hearing, Stein reasserted its argument that the Bureau lacked jurisdiction based on State law and the Twenty-first Amendment. Stein was joined in these arguments by Hayden Beverage, another permittee in Boise, Idaho, which had been cited for similar actions. The ALJ again rejected Stein's position.

The ALJ, in his Initial Decision of September 2, 1983, determined that the Government had proven, by substantial evidence, the allegations contained in Counts I, II and V of the Order to Show Cause involving the retail chains Albertson's, Smith's Food King, and M & W Markets. Counts III and IV, involving the retail chains Grand Central Stores and Circle K Stores, were dismissed. (ALJ's Opinion p. 4.) The Government does not appeal this dismissal. The Initial Decision of the ALJ ordered the su-

pension of each of the basic permits of Stein for a period of 45 days to run simultaneously.

On September 16, 1983, Stein filed a Petition for Review on Appeal of the ALJ's decision. In its Petition, Stein asserts that the Initial Decision is of an arbitrary nature, without reasonable warrant in fact, and is contrary to the law and regulations. In support thereof, Stein asserts that the ALJ's Findings of Fact are contradictory and not supported by the record. Stein also asserts that the practices complained of are authorized by Idaho law, that under the Twenty-first Amendment Federal law cannot prohibit a practice authorized by State law, and that the jurisdictional requirements of the penultimate clause of section 205 of the FAA Act are not met.

Before addressing the issues raised in the petition in depth, it is necessary to make a general summary of the facts involved in this case. The facts that led to the Order to Show Cause are subject to limited dispute. At issue are the events from November 1, 1979 through November 1, 1982. During that period, Stein prepared and presented to the three supermarket retail chains at issue, carefully developed marketing analysis accompanied by schematics proposing the arrangement of the retailers' complete beer and wine sections. Stein also provided the labor to arrange the beer and wine sections in accordance with the schematics. The latter services were referred to as "resets." Stein admits it provided the marketing analysis, including the schematics, and the labor. (Respondent's Memorandum in Support of Petition for Review on Appeal, p. 5.)

Stein is owned and managed by Keith Stein and had 90 plus employees at the time of the hearing. (ALJ's Findings of Fact 29; Transcript [hereinafter Tr.] 1073 and 1078.) It handles Anheuser-Busch (all brands), Miller (all brands), Hamms, Colt 45, and Becks. It also handles Gallo, Paul Masson, Mogan David, Taylor, California Cellars, and several boutique wines. (ALJ's Findings of Fact 29; Tr.

1128-1129 and 1133.) Stein conducts business in 10 1/2 southwest counties in the State of Idaho. (ALJ's Findings of Fact 1; Tr. 1086.)

At the time of the hearing, there were four beer wholesalers in the Boise area, Stein, Hayden Beverage, Coors, and Superior Beverage. (GX-4; Tr. 655-656.) At the time of the hearing there were four wine wholesalers in the Boise area, Stein, Hayden Beverage, Superior Beverage, and Idaho Wine Merchants. (Tr. 1088.) Evidence was presented at the hearing regarding T & J Distributing Co., a wholesaler that operated in the Boise area from January 1977 to October 1979. (Tr. 364-506.) Evidence was also presented regarding the operation of the Pabst distributorship in the Boise area by Patrick A. Halligan, from November 1979 to December 1979. (Tr. 506-540.)

The three supermarket retail chains involved are Albertson's, Smith's Food King, and M & W Markets. Albertson's is a retail food chain of approximately 420 stores with 11 stores in the Boise area. (Tr. 1394.) Smith's had seven stores in the Boise area as part of approximately 130 stores in the western United States. (Tr. 1344-1345.) M & W Markets is an 11-store chain located in Idaho and Oregon. (Tr. 1373.)

Evidence was presented that most of the wholesalers in the area provided, in varying degrees, schematics and labor to the retail stores. (*E.g.*, Tr. 617, 776, 1349-1355.) Hayden Beverage, Stein's most active competitor, provided these services. (ALJ's Opinion, p. 5; Tr. 1355-1356.) Evidence was also presented that some of the breweries and wineries encouraged the services at issue and actively aided the wholesalers. (*E.g.*, RX-I and N; Tr. 861.)

FEDERAL LAW

Section 2 of the Twenty-first Amendment of the United States Constitution states:

> "Sec. 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The FAA Act, 27 U.S.C. § 205 provides, in pertinent part:

> "It shall be unlawful for any person engaged in business as a distiller, brewer, rectifier, blender, or other producer, or as an importer or wholesaler, of distilled spirits, wine, or malt beverages, or as a bottler, or warehouseman and bottler, of distilled spirits, directly or indirectly or through an affiliate; . . .
>
> "(b) 'Tied house'. To induce through any of the following means, any retailer, engaged in the sale of distilled spirits, wine or malt beverages, to purchase any such products from such person to the exclusion in whole or in part of distilled spirits, wine or malt beverages sold or offered for sale by other persons in interstate or foreign commerce, if such inducement is made in the course of interstate or foreign commerce, or if such person engages in the practice of using such means, or any of them, to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products, or if the direct effect of such inducement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such retailer in interstate or foreign commerce: . . . (3) by furnishing, giving, renting, lending, or selling to the retailer, any equipment, fixtures, signs, supplies, money services, or other thing of value, subject to such exceptions as the Secretary of the Treasury shall by regulation

prescribe, having due regard for public health, the quantity and value of articles ivolved, established trade customs not contrary to the public interest and the purposes of this subsection . . .

* * * * *

"In the case of malt beverages, the provisions of subsection (a), (b), (c), and (d) of this section shall apply to transactions between a retailer or trade buyer in any State and a brewer, importer, or wholesaler of malt beverages outside such State only to the extent that the law of such State imposes similar requirements with respect to similar transactions between a retailer or trade buyer in such State and a brewer, importer, or wholesaler of malt beverages in such State, as the case may be."

Implementing regulation, 27 C.F.R. § 6.99, states:

"Industry members may, at a retail establishment stock, rotate and affix the price to distilled spirits, wine, or malt beverages which they sell, provided products purchased from other industry members are not altered or disturbed. The rearranging or resetting of all or part of a store or liquor department is not hereby authorized."

IDAHO LAW

Idaho alcohol law was recodified and amended in 1975. Prior to 1975, Idaho law stated taht services provided by wholesalers, such as stocking, rotation, and restocking, could not have the effect of appropriating, hiding, or reducing a competitor's product. IDAHO CODE § 23-1033 (superseded). In 1975, the law was amended to eliminate the language regarding appropriating, hiding, or reducing a competitor's product. IDAHO CODE § 23-1033. The

relevant Idaho beer statute, IDAHO CODE § 23-1033 (1) (f), provides in part:

> "It shall be unlawful for any brewer, dealer, wholesaler . . . directly or indirectly, to aid or assist any licensed retailer by giving such retailer, or any employee thereof, any discounts, premiums or rebates in connection with any sale of beer, or by furnishing, giving, renting, lending or selling any equipment, signs, supplies, services, or other thing of value, except as expressly permitted by this act; . . . provided, however, that at the request of or with the consent of a licensed retailer, or importer, a distributor, vintner or wholesaler, as an incident to merchandising in the ordinary course of business, and if available to all licensed retailers without discrimination, may:
>
> * * * * *
>
> "Perform services incident to the stocking, rotation, and restocking of beer sold and delivered to such licensed retailer on or in such licensed retailer's storeroom, salesroom, shelves or refrigerating units to the marking of containers of such beer to indicate the selling prices established by the retailer and to the arranging, rearranging or relocating of advertising displays referred to in this section."

The Idaho wine law contains similar provisions. IDAHO CODE § 23-1325.

At oral argument Stein presented a Motion to Augment the Record and, in the alternative, a Petition for Reopening the Hearing. The motion was intended to bring to my attention and to incorporate into the record, an Idaho statute passed on March 31, 1984, and signed by

the Governor on April 4, 1984. The Government raised an objection to the motion.[1] After considering the arguments made, I now take official notice of the statute, including the Statement of Purpose.[2]

The new statute reads substantially the same as the old, except for the section regarding services. The new statute permits the wholesaler to:

> "[P]erform services incident to the stocking, rotation and restocking of beer sold and delivered to such licensed retailer on or in such licensed retailer's storeroom, shelves or refrigerating units to the marking of containers of such beer to indicate the selling price as established by the retailer and to the arranging, rearranging, or relocating of advertising displays referred to in this section. For the purposes of this paragraph,

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[1] The Government attorney, Mr. Brule, was also given the opportunity to submit a brief in opposition to the motion. His brief was received on May 11, 1984. Stein filed a reply brief on May 29, 1984.

[2] The Federal procedural and evidentiary rules that provide guidance to the ALJ and myself indicate that the evidence submitted by Stein is an appropriate subject for official notice of law. 27 C.F.R. § 200.83; Fed. R. Evid. 201; Fed. R. Civ. P. 44.1 *See also, United States v. Holmes,* 414 F. Supp. 831 (D. Md. 1976). The rules of procedure contained in 27 C.F.R. Part 200 clearly permit the ALJ to take official notice of facts material to the case. 27 C.F.R. § 200.128. I find, therefore, that it is within my authority in reviewing this case, to take official notice of the new Idaho law as submitted by Stein.

The Government contended at oral argument and in its brief that the Statement of Purpose was not part of the law and should not be considered. While the Statement of Purpose is not part of the statute, it is part of the bill as passed and signed. Idaho Joint Rule 18 requires each bill to include a Statement of Purpose. I take official notice of the Statement of Purpose as part of the bill passed by the Idaho legislature and signed by the Governor. Because it has no statutory force and is the pronouncement of a later legislature of an earlier legislature's intent, the Statement of Purpose is of minimal probative value. *Consumer Product Safety Commission v. GTE Sylvania, Inc.,* 447 U.S. 102, 119 (1980).

a wholesaler may, with the permission of the retailer, and in accordance with space allocations directed by the retailer, set, remove, replace, reset or relocate all beer upon the shelves of the retailer. Labor performed or schematics prepared by the wholesaler relating to conduct authorized pursuant to this paragraph shall not constitute prohibited conduct or unlawful aid to a retailer."

The attached Statement of Purpose provides:

"In 1975, the Idaho legislature changed the 'Aid to retailers' provisions of the beer and wine law to expressly permit a beer or wine wholesaler, at the request of a retailer, to stock and relocate stocks of wine or beer on a retailer's shelf.

"The Department of Law Enforcement has, in accordance with its interpretation of the law and existing practice since 1975, permitted wholesalers to remove beer or wine, including beer and wine sold by another wholesaler, from the shelves of a retailer with the retailer's permission and to relocate all beer or wine upon the shelves in accordance with space allocations approved or directed by the retailer. The Federal Bureau of Alcohol, Tobacco and Firearms has determined, however, to interpret the Idaho law at variance with the interpretation given by the Idaho Department of Law Enforcement since 1975.

"The proposed legislation does not change any state law enforcement interpretation but merely clarifies the language for purposes of attempting to ensure a Federal interpretation consistent with the state regulatory authorities and the original legislative intent."

ISSUES

1. Twenty-first Amendment

Stein first challenges the Bureau's jurisdiction over this case. In order to address the Twenty-first Amendment issue raised by Stein, I will assume, *arguendo,* that State law permits all of the activities covered by the Order to Show Cause.[3]

Stein's argument is based on the Twenty-first Amendment and two Fifth Circuit cases, *Castlewood International Corp. v. Simon,* 596 F.2d 638 (5th Cir. 1979), vacated and remanded, 446 U.S. 949 (1980), *reaffirmed and reinstated,* 626 F.2d 1200 (5th Cir. 1980); and *Wine Industry of Florida, Inc. v. Miller,* 609 F.2d 1167 (5th Cir. 1980). Stein argues that the Twenty-first Amendment weights the Federal and State relationship of the alcoholic beverage regulations heavily in the State's favor when there is a conflict between State and Federal law. Consequently, Stein concludes that when the State authorizes an activity, a Federal prohibition of that activity is applicable only if the Federal prohibition is based on a substantial Federal interest. Stein concludes that the FAA Act is not based on a substantial Federal interest, citing the Fifth Circuit cases.

The Government argues, based on *Joseph E. Seagram & Sones, Inc. v. Hostetter,* 384 U.S. 35 (1966), *rehearing denied,* 384 U.S. 967 (1966), that there is no conflict between State law and Federal law in this case. Furthermore, the Government argues, if a conflict exists, Federal law is supreme, especially in light of the substantial interest served by the FAA Act.

The ALJ found that there was no conflict between State and Federal law since he found both laws prohibited Stein's conduct. (ALJ's Opinion, pp. 41-42, and 49-51.)

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[3] The issue of whether State law does permit the activities complained of is addressed under section 2, *infra,* Penultimate Clause.

The Twenty-first Amendment creates an exception to the normal operation of the commerce clause, *Craig v. Boren,* 429 U.S. 190, 206 (1976). However, the Amendment does not repeal the commerce clause in the area of alcoholic beverage regulations but gives the States and Federal Government concurrent power to regulate. *Capital Cities Cable, Inc. v. Crisp,* —U.S. —, 104 S. Ct. 2694 (1984); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.,* 445 U.S. 97 (1980); *Craig v. Boren, supra,* at 206; *Joseph E. Seagram & Sons v. Hostetter, supra,* at 42 (1966). Where a conflict occurs between State and Federal law, the provisions must be considered in the context of the issues and interests at stake. *Craig v. Boren, supra,* at 206; *Hostetter v. Idlewild Bon Voyage Liquor Corp.,* 377 U.S. 324, 332 (1964). In *Jameson & Co. v. Morganthau,* 307 U.S. 171 (1936), the FAA Act was attacked on the basis that the Twenty-first Amendment gave the State complete and exclusive control over commerce in intoxicating liquors unlimited by the commerce clause and, therefore, Congress had no authority to control the importation of these commodities into the United States. The Supreme Court responded to this argument bluntly, "We see no substance in this contention." *Jameson & Co. v. Morganthau, supra,* at 172-173 (1936).

There is no conflict between State and Federal laws in this case. The definition of conflict enunciated in *Joseph E. Seagram & Sons, Inc. v. Hostetter, supra,* is the proper standard to apply in FAA Act cases. A conflict occurs when State law requires what Federal law prohibits. *Castlewood* and *Wine Industry* were incorrectly decided since they failed to follow this definition.[4] These cases did not involve situations "where compliance with both federal and state regulations is a physical impossibility for one engaged

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[4] Noteworthy, the holdings in *Castlewood* and *Wine Industry* do not reach the petitioner since they are applicable only in the Fifth Circuit and Stein has its principal place of business in the Ninth Circuit.

in interstate commerce." *Florida Lime and Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-143 (1963). *See also, Jones v. Rath Packing Co.,* 430 U.S. 519, 540 (1977). The courts in *Castlewood* and in *Wine Industry* ignored the admonition that "[i]n this as in other areas of coincident Federal and State regulation, the 'teaching of this Court's decisions . . . enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists.' " *Joseph Seagram & Sons v. Hostetter, supra,* at 45, *quoting, Huron Portland Cement Co. v. Detroit,* 362 U.S. 440, 446 (1960).

Consequently, when a permittee can comply with both State and Federal law, no conflict exists. Since Stein does not argue, nor can the State law be read to require, that wholesalers must perform the services at issue in this case, no conflict exists.

However, assuming *arguendo,* that there is a conflict between Federal and State law, the Federal interest in preventing restraints of trade is sufficiently weighty to override the State's interest in permitting the aspects of extensive in-store servicing at issue in this case. The FAA Act, and particularly section 205 which contains the tied-house provision, was passed to prohibit practices that were "analogous to those prohibited by the anti-trust laws has long been recognized by the courts. *United States v. Tipco Associates, Inc.,* 405 U.S. 596, 610 (1972); *California Liquor Dealers v. Midcal Aluminum Inc., supra* (1980).

For these reasons, Stein's argument that the Bureau lacks jurisdiction because Idaho has preempted the issue must be rejected.

2. Penultimate Clause

Stein's second jurisdictional argument is that, under the penultimate clause of section 205 of the FAA Act, the Bureau lacks jurisdiction to challenge Stein's activities as a beer wholesaler since its actions are permissible under

State law. The penultimate clause requirement is not met if there is no similar State law.

In support of its position that Idaho law permits the activities complained of, Stein presented the testimony of several individuals involved in the 1975 amendment process as to the intention of the Idaho legislature in amending sections 23-1033. Idaho Senator Cy Chase stated in stipulated testimony that the 1975 amendment was made to allow the retailer to authorize the wholesaler to move another wholesaler's products. (RX-C.) Idaho Senator Vernon Brassey testified that the intent of the 1975 amendment was to allow the retailer to receive merchandising services from the wholesaler. (Tr. 21, 24, 30, 31.) Mr. Jay Webb, a legislative advisor for the wholesalers' association, testified that he drafted the 1975 amendment. (Tr. 40.) Mr. Webb stated that he worked with the wholesalers and law enforcement officers in drafting the amendment. (Tr. 44-45.) Mr. William Scott, a member of the Idaho Beer Wholesaler's Association and a member of the legislative committee that worked with Mr. Webb, testified that beer wholesalers had been presenting schematics and offering labor to arrange beer sections at the direction of the retailer since at least 1962. (Tr. 61-62.) He further testified that the amendment to the beer law was made in 1975 to make it clear that these activities did not violate State law. (Tr. 66-67.) Mr. Richard Cade, the Chief of the Alcohol Beverage Control Bureau for the State of Idaho, Department of Law Enforcement, testified that "providing such schematics by wholesalers is not a violation of Idaho law which specifically allows a wholesaler to provide a retailer with 'designs or graphic displays.' It is not otherwise the providing of a thing of value under Idaho law." (Tr. 91.) Mr. Cade further testified that it is not a violation of Idaho law for a wholesaler to move, stock, or rotate beer products at a retail store, even a competitor's products. (Tr. 93; PL-9.) Idaho Senator Mike Mitchell also testified that the intent of the 1975 amendment was to

make it clear that the services offered by the wholesaler in setting a beer section were permitted by State law. (Tr. 109-110.)

The Government argues that the Idaho statute prohibits the services that are the subject of the Order. The Government points to testimony that Federal law was considered in drafting the State law. (Tr. 41.) The Government also argues that State enforcement priorities and lack of resources prevented Idaho from actively challenging the type of services offered by Stein and the other wholesalers. (Tr. 91-92, 93-95.)

The ALJ found that Stein's activities extended beyond those authorized by Idaho law. (ALJ's Opinion, p. 43-51.) The ALJ found that Idaho law prohibited a retailer from moving a competitor's product other than to utilize the space assigned to the wholesaler by the retailer. (ALJ's Opinion, p. 45.) The "complete adjusting of competitor's products on the shelves" was found by the ALJ to be prohibited by both State and Federal law. (ALJ's Opinion, P. 42.)

I find that there is no Idaho law which imposes similar requirements with respect to similar transactions. The State law, prior to the 1984 statutory clarification, can be read to authorize the use of schematics and reset labor. The Idaho provision allows a wide range of services by authorizing services "incident to the stocking, rotation, and restocking" of beer and wine sold and delivered to the retailer. The combination of services offered by Stein was clearly incident to the stocking and rotation of the beer products.

Furthermore, the Chief of the Alcohol Beverage Control Bureau, Idaho, articulated the State's position that the services at issue do not violate State beer laws. The State's position that the State law at issue was specifically amended in 1974 to permit the challenged activities was made clear to ATF during the course of the investigation

(Tr. 155). State officials were fully aware of the challenged activities.

The testimony of the initial drafters, individual legislators, and the head of the enforcement agency provides the only available legislative history of the 1975 amendment. It is the conclusion of all of these individual that Idaho law permits the activities that are the basis of the Order to Show Cause. The Government's argument that Federal law was considered in drafting the State law ignores the clear testimony that the State law was not intended to adopt all of the restrictions imposed by Federal law. (Tr. 21, 68.)

Therefore, I have determined that the Initial Decision of the ALJ that the practices complained of were prohibited under State law should be modified. Because, as the record demonstrates, the practices in question are not prohibited by State law, the Bureau lacks jurisdiction under the penultimate clause of section 205 with respect to Stein's activities concerning malt beverages.

The FAA Act has no similar State law requirement for wine. Consequently, the remainder of this decision will be limited to consideration of the record regarding violation of section 205 by Stein's activities concerning wine.

3. Violation of Section 205

The next question then is whether Stein violated section 205.

The burden is on the Government to establish that Stein willfully violated section 205 by providing a thing of value which induced the retailers to purchase the wholesaler's product to the exclusion, in whole or in part, of a competitor's product. The FAA Act establishes that the decision to suspend, revoke or annul a basic permit must be supported by substantial evidence. 27 U.S.C. § 204(h). The ALJ's findings will be reviewed in this context.

a. Thing of Value

The FAA Act regulations prior to November 23, 1980, stated that a wholesaler could not provide any thing of value to a retailer except as provided in the regulations and the applicable regulations did not specifically authorize the type of services at issue. 27 C.F.R. §§ 6.20 and 6.21 (1979 superseded). The current regulations, which became effective on November 23, 1980, also prohibit providing things of value except as authorized in the regulations. 27 C.F.R. § 6.21. The regulations, particularly section 6.99, set out above, permit a wholesaler to shelve, price and rotate his own product. Section 6.99, however, prohibits a wholesaler from moving a competitior's product.

The evidence establishes that Stein used its considerable resources to develop a sophisticated marketing presentation that included highly trained sales personnel (Tr. 777, 1093), market and sales analysis (Tr. 1139, 752, 793-794; RX-FF), extensive support personnel (Tr. 778, 1084-1085), and carefully considered and developed schematics. All of these items were combined to convince a retailer to purchase and display Stein products in a particular manner, a manner that favored Stein products. The combination of services varied. The schematics may have been rough drawings (similar to RX-F) and at other times the schematics may have been elaborate and detailed charts (such as RX-L). The labor provided may have been minimal (Tr. 641), at other times, the labor may have been extensive. (Tr. 778, 1176.)

Stein argues that the Bureau found in T.D. ATF-74, 45 Fed. Reg. 63251, September 23, 1980, that labor and advice were not things of value. Stein's argument is based on the statements in T.D. ATF-74 that wholesalers need not keep records for stocking, rotation, and pricing services. Stein concludes that records of these services need

not be kept because the services are of little or no cash value.

The ALJ found that the services provided by Stein were valuable to the retailers. (ALJ's Findings Nos. 56, and 62; also p. 33.) Using Albertson's as an example, the ALJ found that the extensive services provided by Stein freed Albertson's employees for other work, kept the sections clean and maintained without cost to Albertson's, and allowed Albertson's to avoid being "hounded by other distributors." (ALJ's Opinion, p. 51.) The ALJ also found that Stein's interpretation of T.D. ATF-74 was incorrect. (ALJ's Opinion, pp. 38-39.

The correct reading of T.D. ATF-74 is that the Bureau concluded that recordkeeping requirements for these items were not necessary since their dollar value was not easily obtainable. A determination not to impose burdensome recordkeeping requirements for services that do not have an easily assigned dollar value is substantially different than a determination that the services lack value. ATF regulations establish that the Bureau considered items, such as in-store services, to be things of value even if the value was difficult to quantify.

The ALJ's findings are supported by the record. The services offered by Stein were of value to the retailers. The labor offered to reset the wine sections as well as the labor available to manage the sections to keep them in conformity with the established schematics was valuable since it freed the retailers' employees for other work. (RX-H, p. 24; Tr. 673, 1270.) The sales analysis and marketing advice provided useful and necessary expertise for the retailers. (Tr. 709-709A, 869.) The retailers acknowledged the value of the services offered by Stein. (RX-H.)

The expertise and marketing services used to convince the responsible parties at the Smith's Albertson's, and M & W stores to rely on Stein to develop wine displays and

the offers of labor to establish the displays were valuable services.

b. Inducement and Exclusion

I conclude, based on my reading of the record, that the ALJ's findings that the Government has established, by substantial evidence, that the marketing services and labor provided by Stein induced the retailers to purchase Stein's products to the exclusion of the competitor's products are supported by the record.

The fundamental flaw in Stein's argument is the failure to come to terms with the limitations imposed by the FAA Act. The activities alleged in this case to be in violation of the FAA Act are not of the sinister, under-the-table type. The activities were part of and an extension of Stein's aggressive approach to how to succeed in the market. But unlike an aggressive wholesaler of other food products to a supermarket retail chain, the wine wholesaler's salesmanship must take into account the strict provisions of the FAA Act.

Thus, Stein's reliance on the testimony of the retailers that they received no inducements from Stein and on the undisputed fact that the retailer, by definition, has the ultimate control over store purchases begs the question. As the ALJ found, the retailers did not understand the nature of the alleged inducements. (ALJ's Findings, p. 34, No.11.) This finding is supported by an examination of the testimony of the retailers. The retailers stated that they were not induced to purchase Stein's products by offers of free labor. (Tr. 1343-1344; RX-H p. 8.) But the question under the FAA Act and the Order to Show Cause is whether the combination of services offered by Stein, from the sales analysis to the monitoring of the retailers' wine sections, affected and influenced the purchasing decisions of the retailers to favor Stein's products to the exclusion of other wholesalers' products. It is the possibility of a

wholesaler influencing a retailer's buying decisions that triggers concern under the FAA Act.

The section Stein is alleged to have violated is section 205(b). Section 205(b) "tied-house" provisions were intended to prevent alcoholic beverage producers and wholesalers from controlling the dispensation of alcohol, by exercising dominion and control over the place at which the liquor is sold, such as retail outlets. *See, National Distributing Co. v. U.S. Treasury Dept.*, 626 F.2d 997, 1008 (D.C. 1980).

The legislative history of the FAA Act also reveals that the unlawful trade practice section, 27 U.S.C. § 205, was premised on the theory that in order to prevent restraints of trade and monopolistic control, conduct that would be identified as conducive of such evils would be specifically prohibited, thereby stopping the monopolistic evil in its incipiency. *See H.R. Rep. No. 1542*, 74th Cong., 1st Sess. 11 (1935). Consistent with this object of quashing unfair competitive conduct at its origin, the Act does not require complete exclusion of the competitor in order for a violation of section 205(b) (3) to exist, but merely:

> * * * " The exclusion in whole or part of distilled spirits, wine, or malt beverages, sold or offered for sale by other persons in interstate or foreign commerce . . . ."

Thus, in interpreting the exclusion requirement, the courts have uniformly afforded the provision a liberal interpretation. *Black v. Magnolia Liquor Co., supra.* In *Distilled Brands, Inc. v. Dunnigan*, 222 F.2d 867 (2d Cir. 1955), where the court equated statutory exclusion to a reduction in a competitor's sales resulting from an unlawful trade practice, the court employed the term "partial interference" interchangeably with the term "partial exclusion" in describing the statutory exclusion prerequisite thereby indicating that exclusion exists whenever one of

the enumerated practices in section 205 results in even a partial disruption of a competitor's sales. *Distilled Brands, Inc. v. Dunnigan, supra,* at 869. Section 205(b) (3) does not await the establishment of a monopolistic power but is offended at the very inception of that conduct declared by Congress to be unlawful.

Thus, the record must be examined for evidence not of a market absolutely controlled by a monolithic entity, but for examples and trends of Stein disrupting competitors' sales by exercising influence over retailer purchasing patterns by providing extensive services.

The wholesalers offered a wide assortment of wines, from pop wines to fine vintage wines, in a variety of sizes and price ranges. The wine could be displayed by brand, variety, or price, with bottles upright on shelves or lying down in bins. The decisions regarding the type of display affected sales. (Tr. 701, 817-818.) For example, exclusion of smaller sized bottles from the shelves discouraged consumers from trying lesser known brands of wine. This would work to the benefit of the nationally advertised wines sold by Stein. (Tr. 549.) Products displayed in favorable locations, where they caught the consumer's eye, would have higher sales, thus encouraging larger future sales. (Tr. 1264-1265.) The object for the wholesaler then was to have its product displayed in the best location in such a manner as to encourage sales.

The record establishes that the wholesalers in the Boise area offered extensive expertise and services in the wine area to influence the retailer into displaying wine in a certain manner, a manner which gave favorable locations and extensive space to the wholesalers who set the wine sections. (Tr. 892, 925-927, 1268.)

The record also supports the ALJ's conclusion that the retail chains involved were willing to turn the responsibility for setting the wine sections, including decisions on the manner of display and the specific types and sizes

displayed, over to individual wholesalers. Often the wholesaler was Stein. (Tr. 709-710, 673, 1357.) The record shows that the retail chains at issue, either on the district or individual store level, made only the most general decisions regarding the wine displays and relying on the expertise of the wholesaler, would allow the wholesaler to select the wines to be displayed, the sizes, and the amount of space given each wine. (Tr. 879, 897, 917, 922, 1001, 1357.)

When Stein was authorized by a retail chain to set a wine section in a store or group of stores, Stein would place its products in the most favorable locations or give its products the most space. (tr. 929.) Beyond this, Stein would determine the space allocation and types of products displayed for its competitors as well. (Tr, 660-661, 793-794, 917, 929, 1262-1263.) After a wine section was set by Stein, Stein's competitors would find that their products had been removed from the shelf and placed in the back room of the store or removed from the regular wine section and placed in close-out sections, indicating that the product would no longer be carried by the store. (Tr. 546, 819.)

Stein's influence over the purchasing decisions of the three retail chains involved in the Order to Show Cause was strong enough that Stein's employees, not representatives of the retail chain, would call a smaller competitor to bring products to a store when it was being set rather than let the space go to Stein's major competitor, Hayden. (Tr. 943-944.) As a result, some of Hayden's products would be excluded from the chain (Tr. 1262-3.)

Despite Stein's characterization of the facts, the concern under the FAA Act is not that displaying products in a particular manner affects sales or that poor selling wines were eliminated from retail stores. The concern is that these buying of decisions were being made by the wholesaler, or by a retailer so strongly influenced by a wholesaler that no independent decision is being made. That

this was the situation in Boise is exemplified by the testimony of other wholesalers that they were directed by managers of retail chains, such as Smith's, to contact a Stein employee to get one of their products on the shelf at the store. (Tr. 625-626.)

Stein's confidence over its influence on product sales and displays is demonstrated by its attempts to obtain the Sebastiani line of wines. Mr. Merino, the national sales manager for Sebastiani in 1979 through 1980, testified that Stein employees presented to him the improvements in shelf placements that Stein could guarantee Sebastiani if the line switched from Superior to Stein. (Tr. 1581-1584.) Mr. Merino testified that a Stein representative stated that Stein controlled the Albertson's. (Tr. 1583.)

The overall impact of Stein's influence on product sales obtained by the expertise and services offered by Stein is difficult to quantify. But its impact on the market is demonstrated in the record.

One of Stein's most effective sales tool was an analysis of market performance by Stein's and competitor's products. Since placement or display would affect a product's sales and being authorized to set a wine section allowed Stein to determine product placement, Stein could translate into hard figures the advantages of continuing the Stein set. (Tr. 673, 793, 917, 929.) Thus, Stein could use its influence to depress sales of a competitor's product by giving it a poor display location and then justify the continuance of a poor location or the close out of the product entirely by the subsequent poor sales. (ALJ's Findings, pp. 20-23 and 49; Tr. 546, 549, 669, 672, 703, 793.)

The state of the market in the three retail chains at issue was such that at least one competitor stopped seeking shelf space in a store where the wine section was set by Stein. The competitor cited the difficulty in acquiring and maintaining shelf space and the store's referral of

questions and complaints about space allocation and display to Stein. (Tr. 631.)

The monetary effect on competition of the influence exercised by Stein is demonstrated in comparisons between sales in the retail chains Stein acquired authority to set and the remaining retail chains in the Boise area. Stein did not set the Buttrey stores in the area. Sales by Stein's competitor's in the Buttrey stores were better than in the Smith's stores which were set by Stein. (Tr. 544 and 558.) The record also offers a specific example of the exclusion from the market in the form of decreased sales of one of Stein's competitors, Superior. Both Stein and Superior serviced two retail stores that were located across the street from each other. One of the stores, Smith's, was set by Stein. The other, a Buttrey store, was set by the store manager. Superior's sales wer significantly higher in the Buttrey store. (Tr. 711-714.) The logical conclusion is that the services offered by Stein that induced the retailer into allowing Stein to set the wine section in the Smith's stores led to the partial exclusion of Superior's products. (Tr. 715.)

The fact that other wholesalers offered the same or similar services does not negate the evidence of inducement or exclusion. No allegation was made, nor would the record support one, that Stein had absolute and continuous control over the retail chains at issue. However, the record does support, by substantial evidence, the conclusion that Stein induced each of the three retail chains, for distinct periods of time, by the offer of extensive services to purchase and display Stein products in a manner suggested by Stein which resulted in the exclusion of other wholesalers' products. The record also establishes that Stein's influence extended beyond isolated incidents in individual stores to have an effect on the area purchasing patterns of three large retail chains. (Tr. 866-867, 673, 778-782.)

Stein relies heavily on the case of *Ed Phillips and Sons Co.*, Docket No. S-142, and the ALJ's Opinion therein. *Phillips* involved an allegation that a wholesaler provided illegal stocking services to retailers. The ALJ in *Phillips* found that, while the services offered were improper inducements, there was no evidence of exclusion. However, this conclusion was based on the unrefuted testimony of retailers who stated that it was the lower prices offered by Phillips that influenced their buying decisions, not the extra services. Thus, the *Phillips* case is distinguishable because the record herein does not establish that Stein undersold its competitors or that services permissible under the FAA Act induced the retailers to rely on and purchase from Stein. In fact, a direct sales comparison showed that although Stein charged more for the same product than a competitor, Stein received the retail accounts on the product. (GX-7.)

c. Willfulness

Stein argues that it did not act willfully, since it believe its actions were permitted under State law. Much of this argument is a restatement of the Twenty-first AMendment argument addressed above. It need not be repeated here other than to state that it is necessary for the wine wholesaler to comply with both State and Federal laws. The wine wholesaler may not simply ignore Federal law.

The threshold for establishing willfulness is established in *Arrow Distilleries v. Alexander,* 109 F.2d 397, 406 (7th Cir. 1940), *cert. denied,* 310 U.S. 646 (1940). No evil intent is required under the FAA Act. Rather, an intentional disregard of the statute or plain indifference to its requirements is sufficient. In *Rex Wine Corp. v. Dunnigan,* 224, F.2d 93 (2d Cir. 1955), the court held that continuing to act in a manner that was the subject of an earlier FAA Act proceeding was relevant to a finding of willfulness.

Mr. Stein admits that he was informed that his company's actions were considered by the Bureau to be a

violation of Federal law by January 15, 1981. (Tr. 1196.) The ALJ found that Stein was informed in August of 1979 by ATF Inspector Crandell that its actions constituted violations of Federal law. (ALJ's Finding, p. 30, no. 79.) The ALJ found that Stein acted willfully for purposes of the FAA Act. (ALJ's Opinion, p. 53-55.)

Stein argues that the explanatory material in T.D. ATF-74, 45 Fed. Reg. 63251, September 23, 1980, discussing 27 C.F.R. § 6.99, is ambiguous. Stein concludes that this ambiguity was sufficient to mislead Stein so that it did not know its actions constituted a violation of Federal law. The paragraph alleged to create the ambiguity states:

> "*Stocking, rotation, and pricing of alcoholic beverages.* The stocking of shelves, rotation of product, and affixing of prices on bottles is permitted at retailer's premises by industry members under § 6.99 (proposed 6.89). An industry member is prohibited from disturbing products sold by another industry member, or from resetting an entire store or liquor department. The industry member must have the permission of the retailer before performing these services."

Stein asserts that the last sentence can only make sense if it authorizes the resetting of other products with the retailer's permission. This is erroneous. As the ALJ concluded, the regulations and explanatory material make it clear that a wholesaler may stock, rotate, and affix prices to its own products and, then, only if it has the retailer's permission. (ALJ's Opinion, p. 36, and 38-40).

The ALJ's finding of no ambiguity in the Federal regulations prohibiting the conduct engaged in by Stein is supported by the record. The record also supports the conclusion that, under the appropriate standard, Stein acted willfully in providing the services complained of to the retailers.

SUSPENSION

After determining that the Government had prevailed by a preponderance of substantial evidence, the ALJ ordered that Stein's wholesaler and importer permits be suspended simultaneously for 45 consecutive days. Stein argues that this is excessive.

The sanctions imposed for violations of the FAA Act must be based upon the facts and circumstances of each case taking into consideration, among other things, sufficiency of evidence, severity of violations, and degree of willfulness involved. Generally, a sanction is imposed in a particular case which best serves to deter future violations and achieves the objectives of the Act.

In light of my determination to modify the ALJ's decision regarding Stein's activities concerning malt beverages, I have determined that the Initial Decision of the ALJ ordering the suspension of Stein's basic permits for 45 days should also be modified. A suspension of 7 consecutive days is, in my judgment, adequate to ensure future compliance with the requirements of the Act, and is at the same time commensurate with the gravity of the violations.

WHEREFORE on this 2nd day of November, 1984, the aforesaid Initial Decision of the Administrative Law Judge is, except as modified herein, approved and affirmed and the Regional Director, Compliance, Bureau of Alcohol, Tobacco and Firearms, Western Region, is directed to issue an appropriate Order to effectuate the Initial Decision as modified suspending basic permits numbered ID-I-765 and ID-P-2894 for a period of 7 days to run concurrently.

Stephen E. HIggins
Director

APPENDIX C

WESTERN REGION

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

U. S. TREASURY DEPARTMENT

DOCKET NO. 309
UNITED STATES OF AMERICA
In the Matter of the Order
to Show Cause why Basic
Permits No. ID-I-765 and
ID-P-2894 of the Respondent
should not be Suspended.

RESPONDENT:

Stein Distributing Co., Inc.
(Idaho Corporation)
601 North Phillippi Street
Boise, Idaho 83706

INITIAL DECISION

On October 29, 1982, the Bureau of Alcohol, Tobacco and Firearms issued an order to show cause why the above basic permits should not be suspended on the grounds that the Respondent willfully violated certain conditions thereof. The Respondent filed an answer making admissions, offering affirmative defenses and generally denying the main charges.

The Respondent is represented by Mr. R. B. Kading, Jr., and Mr. James J. Davis, Attorneys at Law, Eberle,

Berlin, Kading, Turnbow and Gillespie, Chartered, 300 North Sixth Street, P.O. Box 1368, Boise, Idaho 83701.

The Government is represented by Mr. David E. Brule, Attorney at Law, Office of Regional Counsel, Bureau of Alcohol, Tobacco and Firearms, 525 Market Street, 34th Floor, San Francisco, California 94105.

THE ORDER TO SHOW CAUSE

The order to show cause is in five numbered paragraphs. Each pertains to selling beer and wine to a different wholesale grocery chain. Paragraphs III and IV, concerning Grand Central Stores and Circle K Stores, were dismissed on motion of the Respondent, without objection, at the close of the Government's case. (TR-1015, 1016).

The first paragraph or Count I of the order to show cause pertains to Albertson's Grocery Markets. It alleges that from January 1977 through the present, the Respondent, while engaged in business as a wholesale beer and wine dealer in Idaho, willfully violated Section 205(b)(3) of Title 27 of the United States Code, and Section 6.20 of Title 27 of the Code of Federal Regulation (C.F.R.), as a regular continuous business practice at approximately eleven (11) Albertson's Markets in the Boise, Idaho area, by providing things of value, which induced Albertsons to purchase wine and malt beverages sold by the Respondent to the exclusion of similar products sold and offered for sale in interstate commerce by other wholesale dealers. Specifically, it is alleged that the Respondent provided extensive services to Albertson's stores by furnishing schematic diagrams of entire beer and wine sections, including competitor's products, and the labor necessary to reset the beer and wine sections to conform to the schematics. Competitor's products were adjusted to benefit the Respondent.

Count II of the order to show cause charges the same violations as in Count I, from January of 1979 through

the present in the Boise marketing area in five retail liquor dealer food markets of the Smith's Food King Stores.

Count V also charges the same violations, from January 1979 through the present at seven retail liquor dealer establishments of M & W Food Stores in the Boise, Idaho marketing area.

LIMITATION OF ACTIONS

Section 4(i) of the Federal Alcohol Administration Act (FAA) (27 U.S.C. 204(i)) provides as follows: "No proceeding for the suspension or revocation of a basic permit for violation of any condition thereof relating to compliance with Federal law shall be instituted by the Administrator more than 18 months after conviction of the violation of Federal law, or, if no conviction has been had, more than three years after the violation occurred; and no basic permit shall be suspended or revoked for a violation of any such condition thereof if the alleged violation of Federal has been compromised by any officer of the Government authorized to compromise such violation."

The proceeding in this case was instituted on November 1, 1982, by service of an order to show cause. Three years prior to that would be November 1, 1979. Accordingly, no evidence submitted in this case of event which occurred prior to November 1, 1979, shall be considered evidence in support of the basic elements of the offense which are "inducement", "exclusion", and the required nexus with "interstate commerce". Facts developed from events which occurred prior to November 1, 1979, shall be considered only on the issues of willfulness and intent, and shall not be considered as having a bearing on any other issues. In this case, there was neither a criminal prosecution nor a compromise.

THE ANSWER

As a first defense, the Respondent urges that Paragraphs I through V of the order to show cause fail to state a claim upon which relief can be granted.

The Respondent admits that it is an Idaho Corporation and that its principle place of business and mailing address are as stated in the order to show cause. The Respondent also admits that it is the holder of the basic permits, is a wholesale distributor of malt beverages and wine in Boise, Idaho marketing area, and it alleges that it is a wholesaler in 10 1/2 southwest Idaho counties. Next, the Respondent admits that it has at all times mentioned in the order to show cause numbered among its customers, Albertsons, Smith's Food King, and M & W Markets, all of which have maintained retail outlets in Boise, Idaho. Then the Respondent notes that the number of such retail outlets has varied from time to time and has not always necessarily been as stated in the order to show cause.

The Respondent, in Paragraph IV of its second defense, denies each and every further allegation contained in the order to show cause and specifically any remaining allegations contained in Paragraphs I, II and V thereof.

Because Paragraphs III and IV of the order to show cause were dismissed, I will not now make any further reference thereto.

The Respondent offered the following affirmative defenses: (1) Laches; (2) Estoppel; (3) That at all times mentioned in the order to show cause, Sections 23-1325 and 23-1033 of the Idaho Code were in full force and effect and the Respondent operated its business in accordance with these state laws, and by virtue of the Twenty-first amendment to the Constitution of the United States, these Idaho laws are paramount in the field and by virtue of the Enactment of Chapters 10, 13 and 23 of the Idaho

Code, these matters are solely delegated to or reserved in the State of Idaho. The Respondent also alleges affirmatively that most of the acts complained of in the order to show cause are authorized by Part 6 of Title 27 C.F.R., and were done with the expressed consent or at the direction of a licensed retailer of wine or malt beverages, and these retailers owned the products and had the right to exercise all rights of ownership with respect thereto. Finally the Respondent affirmatively alleged in its answer that all of the acts and practices mentioned in the order to show cause have been prevalent in the industry for many years and are encouraged by vintners and brewers.

SUMMARY

The Respondent and its principal competitor in Boise, Idaho, a wholesale wine and beer dealer named Boise Sales (A.K.A. Hayden Beverage Co.) control more than 80% of the wine and beer sales in the grocery stores in the 10 1/2 county area adjacent to Boise, Idaho. Eighty-five percent (85%) of all wine and beer is sold in these grocery stores. The other 15% is sold in bars, taverns and cocktail lounges. The Respondent's share of this business was achieved in the following manner: The Respondent prepared schematic drawings of the entire wine and beer sections of each grocery store. It then went, for example, to the Regional Director of Albertson's stores in Boise, Idaho, and made a sales presentation to him urging that the entire schematic be adopted by Albertsons. The schematic showed where every item of wine and beer, including the competitor's wine and beer, would be placed in the beer and wine coolers and in all of the shelves holding wine and beer in each of the Albertson's stores. The inducement to accept the schematic was that the Respondent's personnel would come to each of the Albertson's markets, pull all the wine and beer from the shelves in the wine and beer sections, including competitor's wine and beer, clean the shelves, clean the cooler

and completely reset the wine and beer sections. The wine and beer was placed in the schematic in such a manner that the Respondent's wine and beer would sell better, but not in such a manner as to hurt the sales of Albertsons or to completely destroy sales of the main competitor, Boise Sales, which carries some of the major brands of wine and beer. If the Regional Director of Albertsons accepted the schematic, the Stein crews immediately went through each Albertson's store rearranging all of the wine and beer in accordance with the schematic picture and then an employee of the Respondent would control the schematic and the positions of all of the wine and beer products in the Albertson's stores until further notice. The same procedure was followed in the Smith's Food King Stores and in the M & W Markets in the same area with the exception of some of these stores in which the Respondent's sales personnel dealt directly with the store manager. Labor to perform this service involved from three to eight hours to complete a reset. The follow up work included many hours of adjusting and servicing the wine and beer sections. As a result of being able to "sell" a schematic and a reset, the Respondent's products were in preferred positions and sales climbed immediately. The sales of the largest competitor, Boise Sales, then dropped. Sales of minor competitors, such as Superior Beverage, dropped even more dramatically and the Respondent retained control of between 40% and 50% of the wine and beer sales in its market area. The Respondent was not able to sell every grocery market in its marketing area with this service. Its main competitor, Boise Sales, has made some sales of its own, and Boise Sales, through the same system, itself controls over 40% of the wine and beer market in the Boise area. An order has been issued by the Bureau of ATF to show cause why the violations committed by Boise Sales should not result in the suspension of the Boise Sales' basic permits. The Respondent's

case was heard first and the Boise Sales case will be set for hearing in the very near future.

Some of the steps taken by the Respondent to promote wine and beer sales were permitted under both Federal and state law. For example, it is permissible under both Federal and state law to use a simple schematic drawing of a wine and beer section as a sales tool. Also the wholesaler may rotate its wine and beer and place its own wine and beer on the retailer's shelves and put price tags on its own wine and beer. This activity is permitted by both Federal and Idaho law. Prior to 1975, Idaho had a provision in its law that these services had to be rendered in such a manner that the products, displays or the shelving, refrigerator or display space assigned by the retailer to any other brewer, dealer or wholesaler could not be thereby appropriated, hidden or reduced. This provision was eliminated in 1975 because it was unworkable. Yet the law of Idaho continued to provide that the services which were permissible could only be provided as to the products that were sold to the retailer by the wholesaler.

The Respondent went beyond what it was permitted to do. The service the Respondent was performing covered the entire wine and beer sections of each store. The Respondent moved everybodies wine and beer putting its own in front and its competitors in back and on the ends. The Respondent thereby controlled the wine and beer sections of the stores. It dictated to the retailers where every item of its competitor's product was to be placed on the shelves. It moved competitor's products to new and less attractive places in the coolers and display racks. It thereby reduced competitor's sales and increased its own. The result was that sales of some of the nationally best selling products handled by Respondent's competitors were reduced to nearly nothing in the Boise area. Examples of this were Sebastiani Wine and Pabst Blue Ribbon Beer. Nationally these items were selling very well and they were hardly selling at all in Idaho because they were not

handled either by the Respondent or Boise Sales, the wholesaler who shared control of the wine and beer business. These products were sold by Superior Beverage and T & J Distributing, companies which could not get their products on the shelves properly. T & J Distributors went out of business and Superior Beverage appeared barely able to survive at the time of the hearing. (February 1983).

FEDERAL LAW AND REGULATIONS

Section 5(b)(3) of the Federal Alcohol Administration Act (27 U.S.C. 205(b)(3)) provides in pertinent part as follows: "It shall be unlawful for any person engaged in business as a . . . wholesaler of . . . wine, or malt beverages, . . . directly or indirectly or through an affiliate: (b) . . . to induce through any of the following means, any retailer, engaged in the sale of . . . wine, or malt beverages, to purchase any such products from such person to the exclusion in whole or in part of . . . wine or malt beverages sold or offered for sale by other persons in interstate or foreign commerce, if such inducement is made in the course of interstate or foreign commerce, or if such person engages in the practice of using such means, or any of them, to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products, or if the direct effect of such inducement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such retailer in interstate or foreign commerce; . . . or (3) by furnishing, giving, renting, lending, or selling to the retailer, any equipment, fixtures, signs, supplies, money, services, or other thing of value, subject to such exceptions as the Administrator shall by regulation prescribe, having due regard for public health, the quantity and value of articles involve established trade customs not contrary to the public interest and the purpose of this subsection . . ."

Section 6.20 of Title 27 C.F.R. was superseded, effective November 24, 1980, by the present regulation. Section 6.20

contains all of the provisions quoted above and also recited the Penultimate Clause of Section 5 of the FAA Act, which provides in part: "In the case of malt beverages, the provisions of subsections (a), (b), (c), and (d) shall apply to transactions between a retailer or a trade buyer in any state and a brewer, importer or wholesaler of malt beverages outside such state only to the extent that the law of such state imposes similar requirements with respect to similar transactions betweer a retailer or a trade buyer in such state and a brewer, importer or wholesaler of malt beverages in such state as the case may be . . ." The remainder of the Penultimate Clause is inapplicable to this case.

The current regulations under the FAA Act became effective on November 24, 1980. Those which are particularly applicable to this case are as follows:

27 C.F.R. 6.21 provides in pertinent part as follows: "Except as provided in subpart D, it is unlawful for any industry member to induce, directly or indirectly, any retailer to purchase any products from the industry member to the exclusion, in whole or in part, of such products sold or offered for sale by other persons in interstate or foreign commerce by any of the following means: . . . (c) by furnishing, giving, renting, lending or selling to the retailer, any equipment, fixtures, signs, supplies, money, services or other thing of value, subject to the exceptions contained in subpart D . . ."

Under the heading "Furnishing Things of Value" 27 C.F.R. 6.41 is applicable. It provides as follows: "GENERAL. Subject to the exceptions listed in Subpart D, industry members are prohibited from inducing the purchases of a retailer by furnishing, giving, renting, lending, or selling to the retailer any equipment, fixtures, signs, supplies, money, services or other thing of value."

Under Subpart D of Part 6 of Title 27 of the Code of Federal Regulations, which is entitled "Exceptions", the following is applicable to this case:

27 C.F.R. 6.99 provides as follows: "STOCKING, ROTATION, AND PRICING SERVICE. Industry members may, at a retail establishment, stock, rotate and affix the price to distilled spirits, wine or malt beverages which they sell, provided products purchased from other industry members are not altered or disturbed. The rearranging or resetting of all or part of a store or liquor department is not hereby authorized."

IDAHO LAW

The present Idaho law pertaining to beer was enacted in 1975, and the pertinent portions thereof are as follows:

Section 23-1033 of the Idaho Code (beer) provides as follows: "FINANCIAL INTEREST IN OR AID TO RETAILERS PROHIBITED - CERTAIN AID PERMITTED - (1) It shall be unlawful for any brewer, dealer, wholesaler or holder of any certificate of approval, directly or indirectly, or through an affiliate, subsidiary, officer, director, agent or employee, to have any financial interest in any licensed retailer's business, or to own or control any real property upon which a licensed retailer conducts his business except such property as shall have been so owned or controlled continuously for more than one (1) year prior to the effective date (July 1, 1975) of this act or, directly or indirectly, to aid or assist any licensed retailer by giving such retailer, or any employee thereof, any discounts, premiums or rebates in connection with any sale of beer or furnishing, giving, renting, lending, or selling any equipment, signs, supplies, services, or other thing of value except as expressly permitted by this act; or, to enter into any lease or other agreement with any retail licensee to control the product or products sold by such retailer, or to provide for any rental or other charge to be paid to

or by the retailer for products display or advertising display space; provided however that at the request of or with the consent of a licensed retailer, brewer, dealer, or wholesaler as incident to the merchandising in the ordinary course of business, and if available to all licensed retailers without discrimination, may:

. . . (f) perform services incident to the stocking, rotation and restocking of beer sold and delivered to such licensed retailer on or in such licensed retailer's storeroom, sales room, shelves or refrigerating units to the marking of containers of such beer to indicate the selling price as established by the retailer and to the arranging, rearranging, or relocating of advertising displays referred to in this section; . . ."

The beer law of the State of Idaho from 1961 to 1975 was as follows:

Paragraph (1) of 23-1033 was substantially the same as the 1975 beer law. However, subsection (a), which followed immediately after paragraph (1), provided as follows: "(a) perform services incident to the stocking, rotation, and restocking of beer sold and delivered to such licensed retailer on or in such licensed retailer's storeroom, sales room, shelves or refrigerating units and to the marking of containers of such beer to indicate the selling prices established by such retailer, and perform services incident to the arranging, rearranging or relocating of advertising displays on the premises of such retail licensee when the same are made up of filled cases, bottles, cans or other containers of such beer then or theretofore sold and delivered to such licensed retailer; PROVIDED, HOWEVER, SUCH SERVICES SHALL BE RENDERED IN SUCH MANNER THAT THE PRODUCTS, DISPLAYS, OR THE SHELVING, REFRIGERATOR, OR DISPLAY SPACE ASSIGNED BY SUCH LICENSED RETAILER TO ANY OTHER BREWER, DEALER, OR WHOLESALER

SHALL NOT THEREBY BE APPROPRIATED, HIDDEN OR REDUCED: . . ."

As stated above, the present Section 1033(1) (f) is a one sentence subsection almost identical to the beginning of the prior 23-1033(1)(a). The portion deleted by the 1975 law was the phrase: "PROVIDED, HOWEVER, SUCH SERVICES SHALL BE RENDERED IN SUCH MANNER THAT THE PRODUCTS, DISPLAYS, OR SHELVING, REFRIGERATOR, OR DISPLAY SPACE ASSIGNED BY SUCH LICENSED RETAILER TO ANY OTHER BREWER, DEALER, OR WHOLESALER SHALL NOT THEREBY BE APPROPRIATED, HIDDEN OR REDUCED;"

It is the contention of the Respondent herein that the deletion of the above paragraph by the Idaho legislature in 1975 means that under the present law, a beer wholesaler may do that which the deleted law prohibited. The Respondent argues that a beer wholesaler may now appropriate and reduce the space assigned to competitors for the storage and display of the competitors beer and when performing these same services, to wit: stocking, rotating and restocking of beer sold and delivered to the retailer and marking the containers of beer to indicate the selling price as established by the retailer and when arranging and rearranging and relocating advertising displays, a wholesaler may appropriate, reduce and hide his competitor's beer.

Here the Government argues that the present Idaho and Federal law continue to prohibit the resetting of an entire wine and beer display by a wholesaler for a retailer, including the relocating of a competitor's wine and beer, when the result is to induce the retailer to purchase beer and wine from the wholesaler to the exclusion in whole or in part of products of interstate competitors.

Section 23-1325 of the Idaho Code pertains to wine. Paragraph (1) and Subparagraph (1)(e) of 23-1325 are

nearly identical to Section 23-1033(1) and 23-1033(1)(f) (beer). No change was made in 1975 to the wine law. Subparagraph 23-1033(1)(a) did not exist in the wine code section prior to 1975.

FINDINGS OF FACT

1. The Respondent, Stein Distributing Co., Inc., is an Idaho corporation with its principle place of business and mailing address as 601 North Phillippi Street, Boise, Idaho 83706. (Admitted in Answer - PL-3).

2. The Respondent is the holder of basic permits ID-I-765 and ID-P-2894 under authority of which it is a wholesale distributor of wine and malt beverages in the Boise, Idaho marketing area. It conducts business in 10 1/2 southwest counties of the State of Idaho. (Admitted in Answer - PL-3).

3. The Respondent numbers among its retail wine and beer dealer customers, Albertson's Markets, Smith's Food King stores and M & W Markets, which maintain retail outlets in the Boise area of Idaho. (Admitted in Answer - PL-3).

4.On October 29, 1982, the Bureau of ATF executed and on November 1, 1982, served an order to show cause under the FAA Act charging willful violations of Section 205(b)(3) of Title 27 U.S.C. and Section 6.20 of Title 27 C.F.R. by the Respondent in connection with sales of wine and malt beverages to Albertson's Markets, Smith's Food King stores and M & W stores, all retail liquor dealers in the Boise, Idaho marketing area. (Order to Show Cause - PL-1).

5.The Respondent filed an answer to the order to show cause generally denying the essential elements of the offenses charged and offering certain affirmative defenses. (Answer - PL-3).

6. As referred to in this decision, a schematic is a drawing of how beer and wine should be favorable displayed for sale in a retail store. (TR-89, 90, 234, 875).

7. A "reset" or "setting a schematic" is the act of taking all of the beer and wine out of a cooler and out of the display racks where it is displayed for sale in retail grocery markets and placing it back into the coolers and racks in accordance with the schematic, which is the diagram or picture of how the products would be set on the shelves. (TR-234).

8. The Respondent regularly sets and resets wine and beer in the stores that are its customers. (TR-170, 220, 221, 239, 268, 383, 1, 475, 1, 478, 1, 530).

9. When setting a wine section, the Stein people take all of the wine off the shelves. This includes competitor's products. They usually clean the shelves if they are dirty. Then they put all the wine back in accordance with the schematic. (Tr-1, 480 and entire record).

10. Mr. Richard D. Faw has been manager of the Stein Distributing Co. Wine Department since February 15, 1982. (TR-1, 458).

11. Since Mr. Faw has been the Respondent's wine manager, he has participated in resets of the wine departments in every Albertson's store serviced by the Respondent. (TR-1, 484).

12. Resets by the Respondent of wine departments in the Smith's stores followed the same pattern as those in Albertsons. (TR-1, 483, 1, 484).

13. Since February 15, 1982, when Mr. Faw began to work for the Respondent, he participated in resetting the entire Smith's store chain twice in the Boise marketing area. During these resets, the entire chain was reset, which included all of the Smith's stores. The Respondent services (sells to) eight of the Smith's stores in the Boise area.

None of these were joint resets with Hayden Beverage (Boise Sales), and prior to each reset, the Stein schematic was approved by Mr. Newcomb of Smith's. (TR-1, 478).

14. On April 2, 1979, Frank Brunetti, the Idaho Division Manager of Albertson's stores, sent a memorandum to all store directors (managers) in the Idaho Division advising them that Mike Spagnolo of the Respondent's company (Stein Distributing), would set all of the Albertson's Idaho Division beer schematics. (GX-2).

15. Following the April 2, 1979, Brunetti letter, if a competing wholesaler of beer wanted to have the position of his beer in any of the Albertson's stores changed, he was directed to go to Mike Spagnolo to ask permission to change the schematic. In other words, if you wanted to change your position in the store, you had to go to your competitor. (GX-2 and entire record).

16. On his first trip to Boise, Idaho, to investigate allegations about the Respondent in August of 1979, Inspector James Crandell of the Bureau of ATF, showed GX-2, the April 2, 1979, memorandum from Frank Brunetti to store directors, to Keith Stein, President of the Respondent corporation. Mr. Stein told Mr. Crandell very distinctly that he provided no labor for resets; that he simply arrived at the store and monitored things; when he arrived there, all the products were out on the floor already; they were taken out of the coolers by Albertson's personnel; and then Albertson's own people steam cleaned the coolers with their own portable units. Mr. Stein insisted that all the Respondent's people did was help the stores out with the schematics. (TR-160, 216, 217). However, according to the later admissions of Keith Stein and the testimony of Belinda Kowalczuk, the Respondent did in fact provide the labor for sets and resets. (TR-375 thru 393, and 1,176 thru 1,178).

17. Floyd Hodges of Boise, Idaho, is owner of Superior Beverages of Boise, a wholesale dealer in wine and beer,

which covers the same geographical territory as the Respondent. Superior Beverage's basic line of wine is Sebastiani, Franzia, Cabernet, Riunite and Yoesmite Rose. They also handle Manischevits, several botique wines, plys imported wines. They also handle domestic beer, including Lucky Larger and Generic Beer. They have Moose Head, Carlsburg, Whitebread and Groelsch, which are imported beers. All together they have 17 different beers. (TR-655, 656).

18. Superior Beverage's territory of services is exactly the same as the Respondent's. Superior has nine employees and 350 accounts. Major stores that they distribute wine and beer to are Albertsons, Buttreys and Smith's Food King. (TR-657, 658).

19. In 1976, the manager of Albertson's Market on 36th Street in Boise, Idaho, permitted Floyd Hodges to experiment with moving beer around in one of their coolers to see how position effected sales. They used Colt 45 beer, which had a facing (container size position) on the top shelf. They moved the item down to an eye level position and tripled the space from one six pack high to three six packs high, with still only one facing. Sales tripled after the change had been made. Thirty (30) days later they put the beer back on the top shelf where it was before the experiment, and sales dropped right back to where they had been. (TR-669).

20. The significance of having your wine and beer in the corner top shelf or the corner bottom shelf of a cooler or in similar positions in display racks is that these are the poorest positions in the store because the consumers look at the center of the wine or beer sections at eye level positions. If your wine or beer was up on the top shelf and somebody bought the first two bottles in the front, the consumer could not even see the bottles in the back and you would then be out of business. (TR-699, 700).

21. The advantage or value to a wholesaler when able to set a wine or beer cooler or display is that the wholesaler can usually place his product in the position that he wants, such as the center at eye level. This will increase his sales. (TR-709).

22. Most of the Respondent's schematics placed the Superior Beverage Co. alcoholic beverage products on the ends. This included Smith's stores. (TR-808).

23. A distributor of alcoholic beverages does not want his products located on the ends of a cooler or the ends of the display. His product would then be hard to see. It is very difficult to promote a product from the ends of a set. Most consumer buying is done in the middle so the ideal situation would be to put your wine and beer in the middle with a large enough spread to get product identification. (TR-808).

24. During the years 1981 and 1982, every major chain store in the Boise area, including Safeway, Buttreys, M & W, Albertsons and Smiths, and many small independent markets, were the subjects of wine schematics and sets done by the Respondent's company. There were 50 to 75 to these during 1981 and 1982. (TR-814).

25. It was unfair to the Superior Beverage Co. when the Respondent made wine sets because of the positioning of Superior's products on the shelves. Secondly, Superior Beverage was not given enough facings. (TR-817, 818).

26. When Stein did a setting, some of the smaller sizes of its competitor Superior Beverage Co.'s brands of wine were eliminated by Stein and this cut into Superior Beverage Co. sales. (TR-817, 818).

27. During the years 1979 and 1980, the Respondent had its schematics adopted by the M & W stores. During this period, the Respondent did the sets of wine and beer at M & W for the entire Boise marketing area, which included all M & W stores. (TR-866, 867).

28. Edward Robertson is the founder and owner of a wholesale wine company named Ohio Wine Merchants, which operates out of Boise, Idaho. He started his business in 1977. When a new market opened nambed D'Alessandro's in the outskirts of Boise, Idaho in 1981, Robertson suggested to the owner that the wine section be set up so that all the different types of wines would be grouped together rather than the brands or the manufacturers' brands in groups. For example, all the Bordeaux wine and the Liebfraumilch wine would be together. Wholesalers like Stein and Boise Sales opposed this because it would have been too difficult for them to figure out the sets to benefit themselves if they could not group all of their own wine together at the most advantageous positions. (TR-897 thru 900).

29. The Respondent, Stein Distributing Co., has between 92 and 95 employees at the present time. They sell Beck Beer, which is imported, Hamns Beer, which includes Olympia and Buckhorn. They have the Miller High Life family, which includes Lowenbrau and Miller Lite. They also have the Anheuser-Busch family which includes Michelob, Michelob Light, Budweiser Light, Natural Light, Michelob Classic Dark and Anheuser-Busch. (TR-1, 078).

30. Gross sales of the Respondent company during the year 1982 were approximately $18,500,000. In testifying during the hearing, Keith Stein admitted that his company went to chain stores and sold them the plan to set up coolers and that Stein employees reset the coolers with wine and beer and he testified that he had never denied doing this. (TR-1, 176, 1, 177, 1, 178).

31. Wholesalers that reset a store with wine and beer normally give their products more favorable positions than they had before. (TR-1, 272).

32. The benefit to the company doing the set is a large increase in volume of sales. For example, in the major Albertson's Food Markets, after a set was completed, the

company which did the set would double their volume each week. There would be a phenomenal difference from virtually nothing each week in sales to very nice orders. (TR-1, 265).

33. If a wholesale wine and beer company does a good selling job, one of their purposes in Boise has been to improve their facings, not necessarily the number of facings, but to put the facings in better locations. (TR-1, 329).

34. Between 1977 and 1979, Keith Stein contacted William Merino, who was then National Sales Manager for Sebastiani Vineyards. Keith Stein showed Mr. Merino schematics of the present shelf setup of Sebastiani wine in Boise, which was then being distributed by Superior Beverage. Keith Stein also showed Merino where Sebastiani would be if he agreed to change distributors in the Boise area and give the distributorship to Stein. Keith Stein said that Sebastiani would double or triple shelf distribution by making the move to his house. Keith Stein represented to Mr. Merino that his company and Boise Sales controlled beer and wine sales in the stores in the Boise, Idaho area. (TR-1, 582, 1, 583, 1, 593).

35. As of March 27, 1980, Sebastiani Vineyards of California, was ranked number two of the premium wineries, and was the fifth largest California winery in the United States, and the sixth largest overall. Sebastiani wine is distributed in the Boise area by Superior Beverage Co. For the period from 1977 through 1980, sales of Sebastiani wine in the Boise marketing area were the weakest in the eleven (11) western states. This was true in spite of the fact that the advertising done by Sebastiani penetrated the Boise area. All promotions that were given by the winery were given in the Boise area, and the pricing structure in the Boise area was the very best available in the market place. (TR-1, 576 thru 1, 578).

36. The Respondent's company is pretty well known throughout the wine and beer industry in the United States for the way they control the Boise market. (TR-1, 594).

37. Facings in coolers for alcoholic beverages are important because if you do not see it, you do not buy it. Showing your product favorably in a cooler is like advertising. (TR-519).

38. The location of beer in a cooler is very important to sales. It should be placed at eye level. You try to put beer in the cooler so that a little old lady can pick it up and anybody can reach it and handle it easily. (TR-519, 520).

39. In November of 1979, Mr. Patrick A. Halligan, who had been a successful wholesaler of Pabst Beer in St. Joseph, Missouri, where Pabst Beer had about 34% of the beer market, came to Boise, Idaho, and took over the T & J Distributing Co., which distributed Pabst in the Boise area and which was going out of business. At that time, the Pabst share of the beer business in the Boise area was approximately one percent (1%). The reason for this was that in the grocery chain stores, such as Albertsons, Smiths and M & W, Pabst had very few facings, maybe one or two at the most, and they were up on the top shelf. A facing is a space equal to the size of a can, a bottle or unit, such as a six pack, of beer in a beer cooler or on a non-refrigerated display shelf. (TR-509 thru 522). (The same definition applies to wine.)

40. Mr. Halligan discovered that in order to get additional facings, it would be necessary, according to GX-2, Frank Brunetti's memorandum, to go to his competitor (the Respondent) and ask for more cooler space. Mr. Halligan had never heard of this in his prior experience in the beer business. (TR-521, 522).

41. Mr. Halligan got out of the beer business in Boise. He said that stores are the key to the business and he

was having absolutely no luck penetrating the stores. He lost $17,000 in the first month of doing business and he felt sure there was no sense of throwing that kind of money away. (TR-525).

42. The picture in the wine and beer business in and around Boise, Idaho, has been hard on the Superior Beverage Co. since 1980. Even though, for example, Albertsons may authorize certain beer and wine, the sets are controlled by either the Hayden Beverage Co. (Boise Sales) or the Respondent, and they place their competitors on the shelf where they feel they want to. These companies put themselves in prime positions on the shelves when they do the wine and beer sets. They take the best cooler positions and put their competitors in less desirable space and they try to reduce their competitors' sales and increase their own. (TR-660).

43. When the Respondent does a set in a grocery store, they call up the competitor distributors and ask them to deliver a certain number of their product to the store. This may be one or two bottles of each and the Respondent will place these items on the shelf. (TR-660).

44. From 1980 to 1982, Floyd Hodges of Superior Beverage was only called about twice in advance of sets being done by the Respondent. He would show up at the other times at the store and find that the set had been done and that his product had been put where Stein wanted it. (TR-663).

45. When the Respondent set a supermarket with wine and beer, the Superior Beverage products usually got poor position. Stein either tried to reduce the Superior Beverage Co.'s facings, reduce the spread or reduce the product line and maybe eliminate part of the product. They eliminated whatever they could of Superior Beverage products. (TR-669).

46. As a result of the resets that were done by Stein Distributing in the grocery stores in the Boise area during

1980 through 1982, Superior Beverage products were often taken off the shelves and discontinued. (TR-672).

47. In the Fall of 1982, all of the Smith's stores were reset by the Respondent. This included both the wine and the beer sections and generally at this time and because of this, Superior Beverage Co. either lost facings or positions or both for its wine and beer in these stores. (TR-676).

48. In the Albertson's stores, during the time of Frank Brunetti, the Respondent literally controlled the beer sets. (TR-682).

49. In one set that was done by Stein for Smith's Food King Five Mile Store, the Respondent eliminated all of Superior Beverage varietal wines in the 750 milimeter size. Generally when the Respondent did such a reset, they eliminated some of Superior Beverage products. (TR-702).

50. During the past three years, the Respondent was the company that set the wine in M & W stores in the Boise market area. (TR-703).

51. During 1982, the Respondent set the beer sections in the Smith's and Albertson's stores in the Boise marketing area. (TR-704).

52. Where Superior Beverage has spreads that are fair and adequate and their products are displayed favorably, they have 15% to 20% of the Boise beer and wine market, but in the total market, because some of the spreads are not fair, they have only 6% to 8% of the market share. (TR-737).

53. Between October of 1980 and July 1982, John Schwenger was Vice President of sales for the Superior Beverage Co. in Boise, Idaho. Superior is a competitor of the Respondent. During this period, when the Respondent did resets at wholesale grocery stores, including Albertsons, Stein did all the labor for resetting the stores. (TR-767, 778).

54. During the period between October of 1980 and July of 1982, Superior Beverage offered to do sets, but they did not have the labor force to economically do it. They probably would have done it if they had the opportunity, but the number of employees that Superior had and the overhead factor of going from store to store and tying up route salesmen made the cost prohibitive for a small distributor to do what Stein was doing. (TR-779).

55. Doing a set as the Respondent did, created a certain amount of favoritism toward the Respondent. (TR-780).

56. The labor furnished by the Respondent was very important. Albertsons had over ten stores in the Boise area, and all the labor in doing the sets, plus the expertise for setting wine, was very valuable to Albertsons. (TR-782).

57. After a Stein schematic was approved by a grocery store such as Smith, the Respondent's employees would go to the store with a group of its own employees who would take all of the wine and beer, including competitors', off the shelves and put it in grocery carts and wash the shelves with cleaner and reset the wine and beer in accordance with an approved schematic and then they would basically move from store to store doing the same thing. These were teams of Respondent's employees. (TR-778).

58. While employed by Superior Beverage, Mr. Schwenger actually went to some of Smith's Food King stores in the Smith's chain and saw products of the Superior Beverage Co. being taken off the Smith's shelves by Mr. Zimmerman, an employee of the Respondent. Schwenger asked Mr. Zimmerman why he was doing this and the answer was that there were changes in the set because of poor store sales of these particular items and they were being discontinued in the wine sets. (TR-104).

59. The wine sets that were done by the Respondent were based on the Respondent's sales analysis and the

Respondent provided the labor to reset the stores. After the sets, Schwenger saw Mr. Zimmerman, a Respondent's employee, in the stores occasionally pulling Superior Beverage Co. products off the shelves. (TR-814).

60. The thing that was unfair about the Respondent pulling off the Superior Beverage products from the shelves after a set, was that the products were then put in a shopping cart and placed in the back room of the store, and the product was no longer authorized for sale in the store. Then the store manager would say: "You have a product in the back room, get it out of here. You can't put your product back on the shelf." Then under Idaho law, the wholesaler cannot even give credit for these items and ill will is created between the manager and the salesman. (TR-819).

61. The resets of the wine and beer sections of chain grocery stores and the cleaning of the shelves and the sales anaylsis that Stein offered the retail grocers influenced the success of the Respondent. (TR-847).

62. The service to Smith's Food King stores given by the Respondent, including the sales analysis and setting of the stores and cleaning of all of the coolers and setting back the wine and beer was valuable. It was a valuable service to the store on a regular basis. (TR-869).

63. If Stein had not provided the labor to do the set itself and to service the store, it probably would not have had its wine sets approved. Its competitor, Superior Beverage, never set many stores because they did not have the manpower to do it. (TR-869, 870).

64. Randy Frye worked for Boise Sales, a wholesale beer and wine distributor in Boise, Idaho, from 1974 to June of 1980. During the last six months of his employment for Boise Sales, he observed the Respondent's employees setting the wine and beer sections of the Smith's Food King stores in the Boise area. The labor provided

by the Respondent involved the taking of all the wine and beer off of the shelves and restocking it into the shelves again. The shelves would be totally stripped, cleaned and then reset. The Respondent would then put all the wine back in the manner that they wished. No other people worked on this but Stein people. Randy Frye would sometimes be there just to see how much damage was being done to his section. When the Respondent reset a section, they would put their items in the most prominent location with the most number of facings. During this same time period, some Boise Sales products were closed out when Stein did resets. If Stein was doing the set, it would be Boise Sales and Superior Beverage products that were discontinued. Fifteen or twenty times as many Superior Beverage and Boise Sales products were discontinuted than Stein products when Stein did a reset. (TR-1,261 thru 1,264).

65. Sometimes in the Boise market, the Respondent would do a set for a certain chain store and then later, their competitors, Boise Sales, would reset the same store. When the Respondent did the set, they moved Boise Sales products to less advanteous positions, and when Boise Sales did a set, they moved the Respondent's products to less advanteous positinos. (TR-1,264).

66. Doing a set involved extensive labor. There would be at least four salesmen and a sales manager who worked for the Respondent doing the set, and it would take from four to six hours to do a set. (TR-1,270, 1,271).

67. A wholesale beer or wine distributor in the Boise, Idaho area never was able to do a set for a grocery company unless it supplied the labor to do so. (TR-1, 271).

68. Breweries have urged wholesalers to use schematics and to do sets. Brewery representatives have actually accompanied the Respondent's employees when they were doing sets or resets in grocery stores. (TR-1,314, 1,319, 1,325).

69. Smith Food King grocery chain does not sell any beer that is produced in Idaho. No Idaho stores sell Idaho produced beer. The only beer ever produced in Idaho was Ed Rock, but it is believed that the company is now out of business. (TR-1,350).

70. Smith's Food King chain sells wines named Ste. Chappelle and Weston Wine, which are produced in Idaho. All the remainder of the wine is made outside of the State of Idaho. (TR-1,361).

71. The only Idaho wine that M & W stores sell is Ste. Chappelle. All the other wines that they sell are produced outside of the State of Idaho. (TR-1,384).

72. The only two Idaho wines handled by Albertson's food stores are Ste. Chappelle, the Sunny Slope Label and Frachelli. All the rest of their wine is produced outside the State of Idaho. (TR-1,406, 1,407).

73. The Respondent handles neither Ste. Chappell nor Franchelli, and all its wines are produced outside of Idaho. (TR-1,407 and entire record).

74. When a wholesale beer or wine dealer has wine or beer on the shelves in supermarkets, it will sell. When it is no longer on the shelf or when it is put in a poor place on the shelf, it will not sell. It sells better in a good position on the shelf. (TR-299, 300, GX-13).

75. Generally when a wholesale beer or wine dealer sets a cooler, he puts more of his product in the best positions and gives his product a larger number of facings. (TR-302, GX -11).

76. Sales of wine and beer in a wholesale grocery store vary in direct proportion to the number of facings that a product has. The more facings, the better the sales. (TR-302, GX-13).

77. The wholesaler that sets up beer coolers or wine coolers or the wine and beer racks in a grocery store is

at an advantage. For example, from March through November of 1980, Boise Sales, a competitor of the Respondent, set the beer sections at Smith's Food King stores in the Boise area. Prior to this, from April through July of 1979, Stein (the Respondent) set the coolers with beer and the Respondent then outsold Boise Sales by a ratio of 2.8 to 1. Then from March through November of 1980, the Respondent's dominance faded to 1.7 to 1. When the Respondent again began setting the cooler late in 1980, it regained its dominance and the ratio went back to 2.42 to 1. (TR-316).

78. At the time of the hearing in this case, Boise Sales and the Respondent were selling 95% of the beer in the Boise market. (TR-357, 358).

79. In August of 1979, Bureau of ATF Inspector James Crandell told Mr. Keith Stein, President of the Respondent corporation, that the services provided by the Respondent in furnishing the labor to do the resets of wine and beer coolers and storage places in chain stores constituted a violation of Federal law. He specifically said that it was not only the schematics, but the labor to set the schematics which violated the Federal law. (TR-1,553, 1,554).

80. On January 15, 1981, Keith Stein and his attorney, Mr. R. B. Kading, Jr., attended a meeting in Seattle, Washington, with representatives of the Bureau of ATF, including David E. Brule and Inspector James Crandell. The meeting concerned the practices set out in the order to show cause and at that time, Mr. Brule told Mr. Stein and Mr. Kading that the Bureau of ATF viewed these practices as violations of Federal law. (TR-1,187 thru 1,196).

81. After the Respondent was served with the order to show cause, their sales force was ordered to stop performing the service which included handling the products of other wholesalers. (TR-1,615).

82. The Respondent filed a motion for summary judgment on the theory that although the practice of furnishing labor for resets was an element of a violation of the FAA Act, the performing of such services does not violate the law of the State of Idaho and therefore it was permissible for the Respondent to violate Federal law. (TR-8, 113 thru 116, 128 and entire record.) The motion was denied.

CONCLUSIONS OF LAW

1. The Respondent received due notice and opportunity for hearing.

2. The Government has prevailed by a preponderance of substantial evidence as to the charges in Paragraphs I, II and V of the order to show cause. Paragraphs III and IV thereof have been dismissed.

3. The basic permits of the Respondent may be suspended.

RULINGS ON GOVERNMENT'S PROPOSED FINDINGS OF FACT

1. Government's Proposed Finding of Fact No. 1 is approved as correct. It conforms to the conclusions made in this Initial Decision. It is more of a conclusion of law than a finding of fact. I agree with it.

2 - 7. Government's Proposed Findings of Fact 2 through 7 are approved as accurate and properly supported by the record. However, these items cover incidents which occurred more than three years prior to the issuance of the order to show cause on November 1, 1982. The incidents occurred prior therefore to November 1, 1979, and are being considered for the limited purpose of showing intent and willfulness and a pattern of activity related to the issues of intent or willfulness.

8 - 38. Government's Proposed Findings of Fact 8 through 38 are all approved as accurate and properly supported by the record.

RULINGS ON GOVERNMENT'S PROPOSED CONCLUSIONS OF LAW

The Government presented three proposed conclusions of law which urge that the Respondent willfully violated conditions of its basic permits as alleged in the order to show cause. I agree with this and the Government's conclusions are therefore approved.

RULINGS ON RESPONDENT'S PROPOSED FINDINGS OF FACT

1 - 5. Respondent's Proposed Findings of Fact I through V are approved as accurate and properly supported by the record.

6. Respondent's Proposed Finding of Fact No. VI is rejected. The proposed finding of fact leaves out certain important allegations. For example, Paragraph I of the order to show cause concerns approximately 11 Albertson's Markets and the providing of things of value to these markets which induced them to purchase wine and malt beverages sold by the Respondent to the exclusion of similar products sold and offered for sale in interstate commerce by other wholesale liquor dealers. The Respondent was accused of providing extensive services to these retail liquor dealers and continuously furnishing schematic diagrams of beer and wine sections of retail stores and the labor necessary to reset the beer and wine sections to conform to the schematics. This included stocking, shelving and routine cleaning of beer coolers and the services also included schematics covering competitive products and the labor necessary to set up and reset entire sections, including the shelving of all competitive products.

7. Respondent's Proposed Finding of Fact No. VII is rejected. The schematic pictures furnished by the Respondent did have a substantial value. This is so because of the particular way that they were presented. Apparently they were attractive schematics that helped sell the retail chain into adopting them thereby enabling the Respondent

to have its wine and beer placed at the most favorable places in the market place, and enabling the retailers to avail themselves of the Respondent's labor and all of this was generated by the schematic, which accordingly had quite a substantial value to each of the parties concerned.

8. Respondent's Proposed Finding of Fact No. VIII is rejected. The evidence shows that the labor performed in resetting wine and beer racks was not performed at the retailer's direction and supervision. The labor was done under the supervision of the Respondent's own employees. The managers of the stores did not direct and supervise resetting of displays. The labor was of substantial value.

9. Respondent's Proposed Finding of Fact No. IX is rejected. I know of no state law that permits the activities conducted by the Respondent herein. If these activities are conducted in other places, in all probability they violate both state and Federal law.

10. Respondent's Proposed Finding of Fact No. X is rejected. Inspector Crandell testified otherwise and I believed Inspector Crandell.

11. Respondent's Proposed Finding of Fact No. XI is rejected. During the hearing, the Respondent and its witnesses seemed to ignore the correct definition of inducement. In their minds, they felt an inducement was something like a bribe in the form of currency handed secretly to the receiver in an envelope. There are other forms of inducements, and this would include the furnishing of extensive labor to reset wine and beer sections in retail grocery stores. Any inducement might also be a bribe.

12. Respondent's Proposed Finding of Fact No. XII is rejected. Certainly the law of the State of Idaho applied to its business. The implication seems that Idaho law permitted the Respondent to do what it did. This is not so.

Idaho law prohibited the same unfair trade practice that is recited in the order to show cause.

13. Respondent's Proposed Finding of Fact No. XIII is rejected. I disagree and I find that the Federal law on this issue is very clear and it is not ambiguous.

14. Respondent's Proposed Finding of Fact No. XIV is rejected. A schematic, depending upon its use, can have great value as it did in this case.

15. Respondent's Proposed Finding of Fact No. XV is rejected. Providing a schematic in and of itself might not be a violation. However, it was a violation of the FAA Act because of the method used in this case. All other elements of the offense were present.

16. Respondent's Proposed Finding of Fact No. XVI is rejected. Resetting and cleaning a retailer's wine and beer shelving does, in my judgment, constitute an inducement when all the wine and beer, including that of a competitor, is removed and the entire shelving area, plus the cooler, are cleaned and all of the alcoholic beverages, including wine and beer are put back into the shelving and into the coolers at the cost of from three to ten employees of the Respondent working from four to six hours. If there were ten workers and they were each receiving $10.00 an hour, then it would cost $100 an hour to keep these workers moving. I consider this a thing of value.

RULINGS ON RESPONDENT'S PROPOSED CONCLUSIONS OF LAW

1. Respondent's Proposed Conclusion of Law No. I is accepted as accurate and properly supported by the record.

2. Respondent's Proposed Conclusion of Law No. II is rejected. Idaho law does not allow a wholesaler to use schematics in the manner that schematics were used by the Respondent in this case. As worded, the conclusion of law is misleading.

3. Respondent's Proposed Conclusion of Law No. III is rejected. Again this is a misleading assortment of words. There is no conflict between Federal law and Idaho law. Neither Federal nor state law authorizes the Respondent to use schematics the way that they were used.

4. Respondent's Proposed Conclusion of Law No. IV is rejected. Idaho law does not permit a wholesaler to provide labor to a retailer in the manner that was illustrated by the facts of this case.

5. Respondent's Proposed Conclusion of Law No. V is rejected as misleading. Again we should note that there is no conflict between Federal and state law as to the issues in this case.

6. Respondent's Proposed Conclusion of Law No. VI is rejected. The facts of this case present a proper nexus with interstate commerce in accordance with the requirements of Section 5(b)(3) of the FAA Act. (27 U.S.C. 205(b)(3)).

7. Respondent's Proposed Conclusion of Law No. VII is rejected. Of course the Respondent should have believed that the law of the State of Idaho applied to its business activities. Federal law also applies. There is no conflict in the laws. Each of them prohibit what the Respondent has been doing.

8. Respondent's Proposed Conclusion of Law No. VIII is rejected. Again I reject the theory that the Federal law in the area of concern is ambiguous. On the contrary, it appears to be very clear and not difficult to understand. It requires that wholesalers of wine and beer treat each other fairly and honorably.

9. Respondent's Proposed Conclusion of Law No. IX is rejected. Testimony of Inspector Crandell, particularly during his rebuttal session near the end of the hearing, is absolutely opposed to this theory.

10. Respondent's Proposed Conclusion of Law No. X is rejected. I do not believe that it is a customary trade practice of the alcoholic beverage industry to furnish valuable inducements for the purpose of having retailers buy the wholesaler's product to the exclusion in whole or in part of other interstate products sold by competitors. Some of the allegations made in the testimony suggested that certain violations were taking place in other states and as pointed out earlier, these allegations are now probably under investigation.

11. Respondent's Proposed Conclusion of Law No. XI is rejected as incorrect. The record shows that the Respondent went far beyond the giving of advise and also furnished valuable labor to the retailers.

12. Respondent's Proposed Conclusion of Law No. XII is rejected. The mere use of schematics would not have led to the improper exclusion of the products of others, but the Respondent went far beyond this by providing the labor to reset entire wine and beer departments of grocery stores. Putting it all together, there was an unlawful inducement which led to exclusion.

13. Respondent's Proposed Conclusion of Law No. XIII is rejected as erroneous. The providing of labor is an inducement which could lead to exclusion or which led to exclusion in the instant case.

14. Respondent's Proposed Conclusion of Law No. XIV is rejected. The marketing practices of the Respondent did lead to the exclusion of the products of others, but they are not considered customary trade practices in the industry unless we conclude that it is customary for the industry to violate the FAA Act and the law of its own states.

15. Respondent's Proposed Conclusion of Law No. XV is rejected as contra to the entire Initial Decision herein.

16. Respondent's Proposed Conclusion of Law No. XVI is rejected. This goes to the very essence of the case, and I am holding that the Respondent did in fact willfully violate conditions of its basic permits as alleged in the order to show cause.

17. Respondent's Proposed Conclusion of Law No. XVII is rejected. This case is not an example of circumstances that would support an estoppel defense. Inspector Crandell testified that he did not state that he failed to find violations of the Act. Possibly the Respondent is referring to the very preliminary investigation stage before Inspector Crandell was able to get his feet on the ground, or actually start his inspection in Boise, Idaho, in August of 1979.

18. Respondent's Proposed Conclusion of Law No. XVIII is rejected. Again this is an allegation that goes to the core of the case and it covers it all, and is contrary to the ruling that I am making herein.

POST-TRIAL BRIEFS

In Page 34 of their brief, the Respondent's attorneys quoted, out of context, the following underlined portion of a paragraph from a pamphlet introducing T.D. ATF-74. When read separately, the paragraph is ambiguous. They argued that the pamphlet provided that "with permission of the retailer", products sold by another wholesaler could be disturbed and an entire store or liquor department could be reset. The purpose of quoting the entire section of the pamphlet is to illustrate the falacy of the Respondent's argument.

On page 7 of the pamphlet the section in question is entitled "STOCKING, ROTATION, AND PRICING OF ALCOHOLIC BEVERAGES." The section is similar to a legislative history coverage of the new regulations. It provides as follows: "*The stocking of shelves, rotation of product, and affixing of prices on bottles is permitted at retailer's permises by industry members under Section 6.99*

(proposed Section 6.98). An industry member is prohibited from distributing products sold by another industry member, or from resetting an entire store or liquor department. The industry member must have the permission of the retailer before performing these services.

No other section of the proposed regulation generated as much public comment. Over 65 respondents to the notice of proposed rule making commented, including all major producer associations, wholesaler associations, and individual wholesalers, producers, retailers, and state governments.

A wide section of the alcoholic beverage industry favored the stocking, rotation, and pricing of alcoholic beverages, as did Consumer Alert, a consumer organization. Among the many reasons favoring the proposal were that: (1) retailers do not have the know-how to properly merchandise wine; (2) industry members will not allow out-of-stock situations to occur, and will keep all brands available on shelves; (3) wine will be fresher because of proper rotation; (4) products will be correctly priced because wholesalers will insure that price reductions are passed on to consumers; (5) competition among industry members will be enhanced, and smaller wholesalers or producers will be able to insure shelf space for their products by performing these services.

Among Respondent's opposed to authorizing these services, the reasons given were: (1) these services wil result in increased cost to industry members who will pass it on to retailers and eventually the consumers; (2) large wholesalers or producers are financially better able to perform these services; (3) it is a very valuable service given to retailers; and (4) it is prohibited by various state laws.

ATF feels that stocking, rotation, and price affixing will increase competition among industry members, will insure fresher products, and will increase the availability of products in the market place. We have, therefore, adopted this

section without change. This section applies equally to distilled spirits, wine, and malt beverages.

Industry members are prohibited from disturbing products sold by other industry members, or resetting an entire store. Although there was considerable comment on this issue, many respondents felt that permitting industry members to service or disturb other products could lead to partial or complete exclusion of those other products from the retailer's premises."

You can see that near the end of this coverage or explanation of 27 C.F.R. 6.99, the new regulation, it was again specifically stated that industry members are prohibited from disturbing products sold by other industry members or resetting an entire store. Admitted there is an ambiguity in the first paragraph. In the Respondent's brief, the Respondent's attorney ignored the last paragraph. The coverage concludes that: "Although there was considerable comment on this issue, many respondents felt that permitting industry members to service or disturb other products could lead to partial or complete exclusion of those other products from the retailer's premises."

Here the Respondent's attorneys were dealing with the original pamphlet sent to wholesale liquor dealers before the November 24, 1980, effective date of the new regulations. If this handout was read by the Respondent and their attorneys, they should have known that they were violating Federal law in the conduct of their business.

The Respondent's attorneys began with the erroneous assumption that Idaho law authorized every act that the Respondent performed which had anything to do with the use of a schematic. This assumption was inaccurate and invalidated the Respondent's argument concerning the Twenty-first amendment to the Constitution of the United States and the recently decided Federal cases, such as *Castlewood International Corp. v. Simon, Infra., Wine Industry of Florida, Inc., v. Miller, Infra.,* and *United States*

v. Texas, 695 F.2d 136 (5th Cir. 1983). The law recited by the Respondent's attorneys related to these cases was stated correctly. However, since the Respondent's attorneys started out with the wrong assumption their argument does not add to the instant case. The attorneys for the Respondent, in order to arrive at their erroneous conclusions, misstated or expanded the testimony of the witnesses used to establish the meaning of the Idaho law, which specifically restricts itself to the movement by a wholesaler of the alcohol beverage products that it furnishes to a retailer. By restricting the shelving and stocking and pricing to products furnished to the retailer by the wholesaler, Idaho law prohibits the removal of *all* wine and beer from coolers and shelves because *all* wine and beer includes the wine and beer of competitors. The thing that is unlawful both under Idaho and Federal law is the complete adjusting of competitor's products on the shelves. This brings the service beyond that which was contemplated by either state or Federal law. When you read the law carefully, you can see that Federal law and state law are quire similar, if not identical. Certainly we do not have a case here like either the *Castlewood* or *Wine Industry* cases as to which the law of the State of Florida was absolutely opposite to the Federal law. In the Florida cases, Florida law permitted that which Federal law prohibited. The explanation given by the attorney for the Government as to why a paragraph was removed from the Idaho law in 1975 is most logical. Here we have a case where the Respondent, in its zeal to sell and to destroy its competition, went far beyond what the state and Federal law permitted.

As its brief, the attorney for the Government filed a 19-page document which was received by the Administrative Law Judge on July 29, 1983, and by the Respondent's attorneys on August 4, 1983. It was entitled "Government's Proposed Findings of Fact and Conclusion of Law". The proposed findings of fact began on page 10,

and the proposed conclusions on page 19. The Government's brief begins on page 1 and ends on page 9. The attorney for the Government cited 11 court decisions in support of the willfulness section of its brief.

In the Respondent's reply brief, the attorney for the Respondent said that the Government has chosen not to file a brief and therefore there was nothing for the Respondent to reply to with the exception of the Government's proposed findings of fact and conclusions of law. The attorneys for the Respondent were mistaken. The brief filed by the attorney for the Government, although not as lengthy in number of pages as the brief filed by the attorneys for the Respondent, was in fact a brief and I found it to have been accurate in its analysis of the elements of the offense and the law applicable to this case.

DISCUSSION

The Government has clearly established that the Respondent willfully violated Section 5(b)(3) of the FAA Act and Sections 23-1033 and 23-1325 of the Idaho Code by furnishing and giving services (inducements) to Albertson's Markets, Smith's Food King Stores and M & W Stores in the Boise, Idaho marketing area as alleged in the order to show cause. The inducements came in the form of furnishing manpower to set and reset the entire wine and beer departments of the various grocery markets. Federal law and regulations and Idaho law permit the Respondent to perform services incident to the stocking rotation and restocking of the wine and beer which the Respondent sells and delivers to licensed retailers. The Respondent is also permitted to mark the containers of its wine and beer to indicate the price and to arrange or rearrange or relocate advertising displays of its wine and beer. The Respondent far exceeded these acts by performing the services not only as to its own wine and beer, but it moved and restacked and stored the wine and beer

sold by its competitors, all in accord with the schematics which it provided.

The evidence shows that there were two companies regularly and vigorously performing these services in the Boise, Idaho marketing area. They were the Respondent and its main competitor, Boise Sales. These two companies controlled more than 85% of the wine and beer sales in supermarkets in the Boise marketing area, and they competed with and excluded each other whenever possible. By engaging in these practices, the two companies also excluded other competition such as the T & J Distributing Co., which went out of business and Superior Beverage Co., which has a very small percentage of the business in the Boise marketing area. It also excluded Mr. Halligan who attempted to establish a new business selling Pabst Blue Ribbon Beer at wholesale. Mr. Halligan left the business in Boise as soon as he realized that his competitors controlled the sales of beer in the supermarket food stores and would not permit him to get started.

There are three elements of the offense of violating Section 5(b)(3) of the FAA Act. First, there must be an inducement. Secondly there must be exclusion in whole or in part, and finally, there must be a sufficient nexus with interstate commerce. Here the Government has clearly shown that providing labor to move entire wine and beer sections including competitor's products was an inducement. The facts also clearly support the conclusion that there was exclusion in part. When the Respondent was able to sell a schematic and then reset the wine and beer department of a large grocery store or a grocery chain, its sales in the store units increased dramatically because it favored its own products by position in the display racks and coolers. Competitors' products were thereby excluded. As for the third element interstate commerce, we are dealing here with products produced almost exclusively outside of the State of Idaho. Accordingly, the control achieved by the Respondent over the wine and beer sales in the

10 1/2 county Boise marketing area substantially restrained and prevented transactions in interstate commerce and the direct effect of the inducements was to prevent, deter, hinder and restrict other persons from selling wine and beer in interstate commerce.

The attorneys for the Respondent point out that in 1975, the portion of Section 23-1033(1)(a) of the Idaho Code, which provided that the services incident to stocking, rotation and restocking of beer sold and delivered to a licensed retailer, must be rendered in such manner that the products, displays or the shelving, refrigerator or display space assigned by a licensed retailer to any other brewer, dealer or wholesaler shall not thereby be appropriated, hidden or reduced, was eliminated from the law. The Respondent's attorneys argue that under the present law, when performing services incident to the stocking, rotation and restocking of beer, they are permitted to appropriate, completely remove, restock, hide and reduce the shelving, refrigerator or display space assigned by a retailer to a competitor. I disagree with this conclusion.

It is my opinion that if a wholesale beer and wine dealer is successful in selling the idea to a retailer that his product should receive more space, then the retailer may assign the additional space to the wholesaler. On orders of the manager of the store and under the present Idaho law, and a realistic interpretation of Federal law and regulations, the wholesaler may remove a competitor's wine and beer from his new space, but that is all. Under the pre-1975 Idaho law, to make any changes whatsoever, it would have been necessary for either the store manager or the competitor to move the competitor's wine or beer. I conclude that the Respondent's attorneys knew better when they argued that under Idaho law, as amended in 1975, a wholesaler may perform valuable and extensive services for a retailer not only on their own wine and beer, but on the wine and beer of their competitors by resetting the entire wine and beer section of a store.

I think it is safe to conclude that the purpose of the Idaho law making it unlawful for a wholesaler to assist the licensed retailer by performing unlimited services involving competitors' products was to prevent the wholesaler from controlling retail outlets and gaining advantage and control of the industry. cf: *Bohemian Breweries v. Koehler,* 332 P.2d 875 (Sup. Ct. of Idaho 1958).

A better understanding of what the Idaho Legislature did in 1975 in its revision or recodification of Chapter 23 of the Idaho Code, and in particular, Section 23-1033 thereof, can be attained when comparing the September 13, 1982, recodification of portions of Title 31 U.S.C. by Public Law 97-258, 97th Congress Second Session. The Legislative History of the codification as found in U.S. Code Congressional and Administrative News Vol. 8, October 1982, Legislative History PL.-97-258, pp. 5 and 6, provides: "Substantive changes not made - as in other codifications undertaken to enact into positive law all titles of the United States Code, this bill makes no substantive change in the law. It is sometimes feared that mere changes in terminology and style will result in changes in substance or impair the precedent value of earlier judicial decisions and other interpretations. This fear might have some weight if this were the usual kind of amendatory legislation where it can be inferred that a change of languages is intended to change substance. In the codification law, however, the courts uphold the contrary presumption: the law is intended to remain substantively unchanged . . ." Going further, it is stated in 82 C.J.S. 271, "*Statutes*" that "revision contemplates a redrafting and simplification of the entire body of statute law; it involves the elimination of duplications, contradictions, obsolete and obsolescent provisions, redundant, tautological, prolix, and verbose statements; it is a complete restatement of the law. The principal function of a code is to reorganize the statutes and state them in simpler form. The purpose of a revision or a codification of laws is to make them as certain as

practicable and to enable every citizen readily to find where they are and what they declare, by publishing them in a systematic, condensed, but clear and comprehensive form, or to embody as nearly as practicable all the law of a state, from whatever source derived. The legislature, in enacting revised laws, may exercise its power to correct verbal inaccurancies or to improve the style in which the statutes are expressed . . ."

In Sutherland, Statutory Construction (4th Ed., Sands, 1972) secs. 28.10, 28.11, when discussing the revision of a statute the author said: "But the disclosure of a changed intention must be clear for it is presumed that if the language used in the code fairly admits of a construction consistent with the old law, it was not the legislature's intent by a change in language to change the meaning of the law." See *King v. Menz,* 75 N.W. 2nd 516 (S.C. N.D. 1956). Here the court said at 520: "This court has repeatedly held that changes in punctuation and phraseology in codification do not effect the original meaning of the law." cf: *Glenn v. United States,* 129 Fed. Supp. 914 (S.D. Cal. 1955).

To determine what the Idaho legislature intended, we would look at the legislative history, but here, as to the 1975 recodification of Chapter 23-1033, there was no legislative history. Therefore, we must look at the wording of the law as it was before recodification and how it is now. We can also obtain testimony from those who took part in the recodification.

The only evidence in the record to indicate intention of the legislature came through the testimony of individuals who took part in the enactment of the recodification and persons who were connected with the alcoholic beverage business in Idaho at the time of the recodification. For example, William Lee Scott, the retired beer wholesaler testified that he felt that the word in the prior law that caused the most problem was the word "reduced". He

said if you are operating a grocery store in Idaho and a wholesaler came to you with a schematic and you approved it and the schematic called for reducing another wholesaler's space in the cooler, then the first wholesaler would be in violation of the law if he moved the competitor's beer to put his own beer in the newly acquired space. This was the reason they took the prohibition out of the law. (See TR-79).

Former Idaho State Senator Vernon K. Brassey testified that it was the intent of the legislature to liberize some of the relationships between retailers and wholesalers and brewers. He testified that prior to the change in 23-1033 the wholesaler was almost prohibited from doing anything for the retailer except just bringing the beer in and setting it in the store. (TR-14, 15).

Mr. Jay Webb of Boise, Idaho testified that he acted as an attorney or a lobbist for the wholesalers of Idaho prior to the change in Idaho law of 1975. Mr. Webb actually drafted the changes in 23-1033, but he could not remember why he made the changes except that it was to clarify the law and make it more workable. In making the changes, he used as a pattern the laws of three surrounding states and the Federal law. He did not have enough notes and his memory was not good enough to give any further explanation. (See TR-39 thru 53).

The court in *Wine Industry of Florida, Inc. v. Miller,* 609 F.2d 1167 (5th Cir. 1980) said: "Over forty years ago, in an effort to diminish unfair competition in the alcoholic beverages field, the Congress of the United States passed a "Tied-house Evil" law. 27 U.S.C. 205(b). This law prohibits any wholesaler of alcoholic beverages from providing to the retailer services which have the effect of inducing retailers to deal with them to the exclusion of other wholesalers . . ." The court also noted that in response to the Federal law and related regulations, the State of Florida enacted Section 561.424 of the Florida Code. At that point

in time, Federal regulations prohibited stocking and pricing and the new Florida law specifically permitted it. Later, the Federal regulations also permitted limited servicing which made Florida and Federal law, on this issue, very similar. After 561.424, while the state law remained inconsistent with the Federal law, the Court of Appeals held that to the extent Federal legislation is inconsistent with state liquor control legislation, under the Twenty-first amendment, the Federal legislation must give way to the state legislation. The court held that Florida law permits that which the Federal law prohibits. The court concluded: "Here, as in *Castlewood*, Federal law prohibits conduct permissible under state law, namely in-store servicing which has an anticompetitive effect. The Federal interest and ATF Rule 77-4 are the same as were present in *Castlewood*. Accordingly, being bound by *Castlewood*, we reverse and remand for the District Court to enter an order in accordance with this opinion."

The *Castlewood* court noted that under Florida law, a liquor distributor and a retailer are free to negotiate a mutually acceptable selling price regardless of whether the price is at, above or below the distributor's cost and once the price is agreed upon, the wholesaler is obligated to treat all retailers equally. Here again the court relied upon the Twenty-first amendment to the Constitution and held that Federal laws have prevailed over state regulations of intoxicating liquors in only two circumstances: "(1) where the state regulation was repugnant to overriding national concern with due process and equal protection, and (2) where the state has sought to invade an area of exclusive Federal concern, such as Federally owned installations, regulation of commerce with foreign nations, and taxation of imports from foreign countries . . ." The *Castelwood* court held that there was no interest of sufficient magnitude in support of the Federal position and therefore, in view of the conflict, the Florida statute must prevail. Here again there was a state statute directly permitting

what the Federal law prohibited. See *Castlewood Internat. Corp. v. Simon*, 596 F.2d 638 (5th Cir. 1979).

In our case we have no such conflict between Federal and state law. The Federal law and Idaho law both prohibit furnishing services to the extent that they were provided by the Respondent. Idaho law permits certain services, but those services may be rendered only as to the wine and beer that was sold and delivered to the retailer by the particular wholesaler rendering the service. Federal law is the same. The Respondent gained its share of control of the Idaho wine and beer industry by performing extensive services not only as to its own wine and beer, but to the wine and beer of its competitors. This was a prohibited unfair trade practice under the law of both the State of Idaho and the Federal Government. This was an example of a wholesaler overstepping his authority in his zeal to succeed.

Let us again take a careful look at the combination or agreement that existed between the Respondent and Albertson's stores at the time Frank Brunetti was a Regional Sales Manager. One of the Respondent's salesmen made a presentation to Frank Brunetti and sold him on the idea of having the Respondent's sales people reset all of the beer sections in the Albertson's stores in the 10 1/2 county area serviced by the Respondent. The benefit to Albertson's stores was that the Respondent was going to provide extensive manpower to the degree that Albertson's own employees would not need to touch the beer sections. They would be completely cleaned and reset and maintained without any cost to Albertson. Albertson was not then hounded by other distributors and dealt only with the Respondent. The benefit to the Respondent was that its products would be placed in the coolers and other display places in the most advantageous positions, and this would cause a dramatic increase in the Respondent's sales of beer and a reduction in the sales of beer by the Respondent's competitors whose products would be put in less attractive

spots. There is nothing in the law of the State of Idaho to sanction combinations of that sort. See *Washington Brewers Institute v. United States*, 137 F.2d 964 (9th Cir. 1943), Cert. Den. 320 U.S. 776 (1943).

Mr. Maddocks, the Respondent's sales manager, is extremely aggressive as sales managers apparently should be. His aggressiveness goes to a desire to destroy competition. It may well be permissible to destroy competition by outselling it, but to destroy competition with unfair trade practices such as exhibited in this case, is not permitted under the Idaho or Federal law.

I must conclude that we have clear evidence of an inducement which violates both Federal and state law. We also have clear evidence of exclusion in part and there is clear evidence establishing the interstate commerce nexus.

Next we turn to the question of willfulness and again we have a clear picture showing that the conduct of the Respondent in violating state and Federal law was willful. The Bureau of ATF has been making its position known to the Respondent since the middle of 1979. When Inspector Crandell first discussed the violations with Keith Stein, the President and sole stockholder of the Respondent corporation, Mr. Stein denied that he was performing any services whatsoever that included the handling of a competitor's products. He denied touching competitor's products when resetting wine and beer sections of grocery markets. Later in the inspection, Mr. Stein and his attorneys took the position that they were in fact and always had been resetting entire wine and beer sections, including the products of their competitors. They now take the position that this is permitted by the law of the State of Idaho. However, this is merely an argument and it is evident that they knew that it was not lawful to go as far as they went with these services to their retail customers. Mr. Stein and his attorney went to a meeting in Seattle, Washington, in 1981 and were told then what

position the Bureau of ATF had taken and that the opinion of the Federal Government was that they were violating the law by furnishing these valuable services. Of course there are three elements to an offense like this. First there must be the inducement and the inducement must result in exclusion in whole or in part and there must be a nexus with interstate commerce. The giving of an inducement may not be unlawful if the other two elements are not present. At times therefore, ATF must restrain itself from unequivocally declaring that an act is a violation of the FAA Act. They must do this in order to remain aware of the possibility that the other elements are not present, but this understandable position does not lessen the Government's case. Here we have an instance where the Respondent was repeatedly advised of the law and took a chance and violated it in order to succeed and grow in a business sense. Clearly therefore, its acts must be considered willful.

The fact of knowledge and willfulness may be established by direct or circumstantial evidence, just as any other fact in a case. Deliberate avoidance of such knowledge, such as knowledge that it is unlawful to furnish valuable services as an inducement and thereby exclude competitors competing to sell interstate alcoholic beverages, is the equivalent of actual knowledge if the violator was aware of the high probability that this type of trade practice was unlawful. Keith Stein's denials during initial interviews with Inspector Crandell and his refusal to take heed of the warnings given by the Bureau of ATF bring this case within this legal principal. See: *United States v. Nicholson,* 677 F.2d 706 (9th Cir. 1982); *United States v. Jewell,* 532 F.2d 697 (9th Cir. 1976), Cert. Den 426 U.S. 951 (1976); *United States v. Glick,* 710 F.2d 639 (10th Cir. 1983).

From the entire record, it is clear that the Respondent intentionally disregarded Federal law and regulation, and was plainly indifferent to both the Federal and state re-

quirements. The Respondent acted purposely and obstinately knowing what it was doing was wrong. Its actions in gaining partial control of the wine and beer business in the grocery chains by jumping beyond the clear limits of the law was the very essence of willfulness. See *United States v. Illinois Central Ry. Co.,* 303 U.S. 239 (1938). Willfulness denotes that which is intentional or knowing or voluntary as distinguished from accidental. The term is employed to characterize conduct marked by careless disregard of whether or not one has the right to so act. Here the Respondent was more interested in improving sales and making more money than in following the law. See also: *Arrow Distilleries v. Alexander,* 109 F.2d 397 (7th Cir. 1940); *Rex Wine v. Dunigan,* 224 F.2d 93 (2nd Cir. 1955).

The Respondent's defenses of laches and estoppel are rejected as not supported by the facts.

In the reply brief of the Government, there is a quotation from the testimony of Mr. Ray Norvell, the Executive Vice President of three large wholesale liquor dealers in the State of Nevada, The quotation was from testimony given during Senate hearings before the Committee on Appropriations during Fiscal Year 1983. I think that Mr. Norvell was absolutely correct, and his words are most appropriate for this case. I will conclude this decision by repeating him as follows:

> "On my particular end as a distributor, we have a significant market share in the city of Las Vegas. With absolutely no controls put on myself and I like to think I would possibly live with the FAA Act even if there wasn't an agency, but my heart tells me I probably wouldn't. I could sit down and in all honesty you could sit down and run the small distributor out of business if you wanted to. You could move his products off the shelf, which right now we are not allowed to do. We are allowed to move our own prod-

ucts on the grocery store shelves, that sort of thing. If there were absolutely no agents to control it, we could sit down and move his products to the bottom where the consumer could never see it, and it would just be an open market where the large would get larger and the weak would go out of business."

DECISION AND ORDER

The Government has prevailed by a preponderance of substantial evidence. It is ordered that basic permits number ID-I-765 and ID-P-2894 of the Respondent shall be suspended simultaneously for a period of 45 consecutive days to commence at such time as the Regional Regulatory Administrator shall specify.

Kenneth L. Travis
Administrative Law Judge

September 2, 1983
Washington, D.C.

APPENDIX D

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 84-7870
Dept. of the Trea.
No. 309

STEIN DISTRIBUTING COMPANY, INC.,
Petitioner,

vs.

DEPARTMENT OF THE TREASURY BUREAU
OF ALCOHOL, TOBACCO & FIREARMS,
Respondent.

FILED

March 10, 1986

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that pursuant to 28 U.S.C. § 1254(2), Stein Distributing Company, Inc.,

Petitioner above, appeals to the United States Supreme Court from the final judgment of the United States Court of Appeals for the Ninth Circuit entered in this action on the 3rd day of January, 1986.
DATED THIS 7 day of March, 1986

EBERLE, BERLIN, KADING, TURNBOW & GILLESPIE, CHARTERED

By: B. Newal Squyres, Jr.

CERTIFICATE OF MAILING

I HEREBY CERTIFY That on the 7 day of March, 1986, I served two true and correct copies of the foregoing NOTICE OF APPEAL upon the following:

Steve MacIssac
Department of Justice
Main Building, Room 3312
Washington, D.C. 20530

by depositing said copies in the United States mail, postage prepaid, in an envelope addressed to said person at the foregoing address which is the last address of said attorney known to me.

B. Newal Squyres, Jr.

APPENDIX E

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL REGULATION ORDER

ADOPT THE FOLLOWING PROVISION OF TITLE 4, CHAPTER 1, CALIFORNIA ADMINISTRATIVE CODE: ADOPT RULE 106 TO READ:

106: Advertising and Merchandising of Alcoholic Beverages: (a) Free Goods. No licensee shall; directly or indirectly, give any premium, gift, or free goods in connection with the sale or distribution of alcoholic beverages, and no retailer shall; directly or indirectly, receive any premium, gift or free goods from a supplier of alcoholic beverages; except as authorized by this rule or the Alcoholic Beverage Control Act. (b) Definitions: Unless the context otherwise requires; the following definitions govern the construction of this rule:

(1) "Supplier" means any manufacturer, winegrower, manufacturers agent, California winegrowers agent, rectifier, blender, broker, distiller, bottler, importer, wholesaler, or any officer, director, agent or affiliate of any such person.

(2) "Retailer" means any on-sale or off-sale license or any holder of a temporary retail permit.

(3) "Sign"means a flat material or a three dimensional unit (other than the advertised product itself) principally bearing a conspicuous notice of the manufacturer's name, brand name, trade name, slogans, markings, trademarks or other symbols commonly associated with and generally used by the manufacturer in identifying the manufacturer's name or product,

with or without other graphic or pictorial advertising representations, whether illuminated or mechanized, including but not limited to posters, placards, stickers, decals, shelf-strips, wall panels, shadow boxes, price boards, mobiles, inflatables, dummy bottles, bottle toppers, case wrappers, neck ringers, brand identifying statuettes, tap markers, table tents, mirrored signs, plaques and other similar items after approval by the Department.

A sign advertising distilled spirits or wine shall have no secondary value and be of value to the retailer only as advertising.

(4) "Decorations" means material other than permitted signs, displays, promotional material, and the product itself which are used in the interior of retail premises for the embellishment of said signs, displays and promotional materials. "Decorations" include such items as holiday decorations, paintings, pictures, streamers, bunting, corrobuff, inflatables, foil, trimming and other temporary material. Such decorations shall have no intrinsic or significant utilitarian or secondary value other than as an embellishment. Each decoration furnished by one supplier in use at one time shall not exceed $50 original cost to the supplier, or if not purchased by or for the supplier, shall not exceed the total fair retail market value of $50.

(5) "Promotional materials" means material of any kind other than permitted signs, displays, decorations, and the product itself furnished by a supplier to a retail licensee for advertising purposes. Promotional materials shall have no intrinsic or significant utilitarian or secondary value other than as permitted by this rule.

(6) "Window display" means the exhibition in windows of any or all of the following: permitted signs, promotional material, decorations and the advertised product itself.

(7) "Temporary floor display" means the exhibition of alcoholic beverages in off-sale premises by means of racks, bins, barrels, casks, shelving and similar devices from which alcoholic beverages are displayed and sold. Such displays shall bear conspicuous advertising required of a sign. "Temporary" shall mean a period of time not exceeding four months.

(8) "Sales" as used in this rule means the total business of merchandising alcoholic beverages, including the solicitation of customers and the various methods and procedures used in advertising and promoting the sale of alcoholic beverages, as well as the actual transfer of title of alcoholic beverages. (c) Signs and Displays. A supplier shall not give or furnish signs or displays advertising alcoholic beverages to a retailer, except as permitted by this rule or the Alcoholic Beverage Control Act.

(1) Interior Signs. A supplier may furnish interior signs advertising alcoholic beverages sold by him to a retailer for use within on-sale or off-sale premises, provided no such sign relating to wine or distilled spirits for use within an on-sale premises shall exceed 630 square inches. A sign shall be deemed to be an interior sign although placed in a window and primarily visible from outside the premises. Interior signs furnished by suppliers which advertise distilled spirits and wine shall have no secondary value and be of value to the retailer only as advertising. Suppliers may not directly or indirectly or through an arrangement with affiliate or other person pay or credit the

retailer for displaying the inside sign or for any expense incidental to its operation.

(2) Exterior Signs. No supplier shall sell, rent or otherwise furnish an exterior sign to any retail licensee except that any wholesaler may sell such a sign to any licensee at a price not less than the current market price for such sign.

No supplier shall place any sign, banner display, or other devise advertising alcoholic beverages on or over any public sidewalk, street or thoroughfare; nor shall any supplier place such signs on or adjacent to any retail premises or parking lot used in conjunction with any premises; provided however, that a supplier may temporarily furnish non-permanent interior signs, banners and inflatables to organizations in connection with events described in subsections (i) and (j)(2) of this rule.
"Exterior Signs" include but are not limited to billboards, inflatables, panels and any other device used to advertise a suppliers product.

(3) Displays. A supplier may furnish, install, set up and service signs, promotional materials and decorations as window displays or temporary floor displays in off-sale premises. The supplier shall not, directly or indirectly or through an arrangement with an affiliate or other person, pay or credit the retailer or employees or agents of the retailer for the privilege of placing such advertising materials within the retail premises, or for any expenses incidental to their operation.

(d) Wine Lists. A supplier shall not furnish wine lists to a retailer except as permitted by this Rule.

A supplier of alcoholic beverages who is authorized by his license to sell wine to retailers may furnish to retailers authorized by their license to sell wine, lists of wine sold and or produced by him/or other suppliers, provided that the material for such lists and all components thereof shall not cost more than $25 per unit original cost to the supplier. A supplier may not make payment to a retailer for the purchase of wine lists, or reimburse a retailer for payment already made for the purchase of wine lists. Without limitation, the following may appear on said list: (1) the name (or names) of the producer (or producers) of the wine and address, logo, slogan or other symbols or markings associated with and used by the producer in identifying his name or products, (ii) name of product (or produce.s), brand name, price, size, vintage date, bin number or other product designation. (iii) Product description or identifying information or appellation of origin. (iv) the name of the retail licensee to whom the list is furnished and such retailers address, slogan, logo, etc. associated with and used by the retailer in identifying his name, business or establishment.

(e) Advertising Specialties. No licensee shall give advertising specialties except as permitted by this Rule or upon prior approval of the Department.
(1) Retailer Advertising Specialties. A supplier may furnish, give, rent, loan or sell advertising specialties to a retailer provided such items bear conspicuous advertising required of a signa nd the total value of all retailer advertising specialties furnished by a supplier directly or indirectly, to a retailer shall not exceed $50 per brand in any one calendar year per retail premises. The value of a retailer advertising specialty

is the actual cost of that item to the supplier who initially purchased it. Transportation and installation costs are excluded. The furnishing or giving of any retailer advertising specialty shall not be conditioned upon the purchase of the suppliers product. Retail advertising specialties given or furnished free of charge may not be sold by the retail licensee. Retailer advertising specialties include but are not limited to trays, coasters, coin mats, napkins, thermometers, jiggers, clocks, stirring spoons, pouring spouts, sponges, towels, menu cards, meal checks, calendars and similar items approved by the Department and which have inconsequential value.

(2) Consumer advertising specialties. Consumer advertising specialties such as ash trays, bottle or can openers, litter or shopping bags, matches, recipe cards, pamphlets, pencils, post cards, hats, posters, bottle or can stoppers, and other items approved by the Department, and which bear conspicuous advertising required of a sign may be furnished, given or sold to a retail licensee for unconditional distribution to the general public.

Consumer advertising specialties furnished by a supplier to a retailer or to the general public shall not exceed $1 per unit original cost to the supplier who purchased it, provided, however, no such specialties advertising beer shall be given by a supplier to a retailer if the original cost per unit to the supplier exceeds .25¢.

A retailer may not be paid or credited in any manner directly or indirectly for distribution service nor shall consumer advertising specialties furnished free of charge by a supplier be sold by a retailer. A retail licensee may give advertising specialties to consumers

provided such gifts are not coupled with the purchase of any alcoholic beverage and the original cost per unit to the retailer or the supplier does not exceed $1.

Coin banks, toys, balloons, magic tricks, miniature bottles or cans, confections, dolls, or other items which appeal to minors or immature persons may not be used in connection with the merchandising of alcoholic beverages.

(3) Records. Suppliers shall keep and maintain records at the licensed premises, for a three year period, of all items furnished to retailers under the provisions of this subsection. Commercial records or invoices may be used to satisfy this record keeping requirement if all required information is shown. These records shall show:

(1) The name and address of the retailer receiving the item:

(2) The date furnished;

(3) The item furnished;

(4) The supplier's cost of the item furnished (determined by manufacturers invoice price) and,

(5) Charges to the retailer for any item

(f) Cooperative advertising. No supplier of alcoholic beverages directly or indirectly, shall participate with a retailer in paying for an advertisement placed by the retailer, nor shall any signs, displays, advertising specialties promotional materials or decorations furnished by a supplier as permitted by this rule refer to the retailers name or business.

(g) No licensee, in connection with a licensed business, shall give any alcoholic beverage to any person

to whom the license is authorized to sell except as provided by in Rule 52 and Section 23386 of the Alcoholic Beverage Control Act.

It is not the intent or purpose of this Rule to prohibit an on-sale licensee or any employee of such licensee from giving an incidental drink to a patron.

(h) Public Service Activities. Without violating this rule suppliers may furnish services to communities and bona fide nonprofit organizations in connection with public service or fund raising activities including picnics, parades, fairs, amateur sporting events, agricultural exhibitions, educational clinics, public concerts, and other similar events when approved by the department provided no such services are conditioned, directly or indirectly, upon the purchase of an alcoholic beverage or the exclusive sale of a suppliers product at such events. No such services shall be furnished for the benefit of any permanent retail licensee. Notwithstanding the prohibitions contained in subsection (f) of this Rule, suppliers may furnish or share in the cost of advertisements, signs, promotional materials, etc. used in connection with such public service activities. Such advertising material may refer to the name of the temporary retail licensee sponsoring the event.

(i) Contests.

(1) Contests sponsored by retail licensees. Without violating this rule, retail licensees may furnish prizes other than alcoholic beverages, to participants in competitive events held on the licensed premises, provided participation in such events shall not be conditioned on the purchase, sale or consumption of alcoholic beverages and provided that such contest or competitive

event does not involve the consumption of alcoholic beverages.

(2) Contest sponsored by suppliers. Without violating this rule, suppliers may sponsor contests, races, tournaments, and other similar activities on or off licensed premises. Sponsorships shall be only in the form of monetary payments to bona fide amateur or professional organizations established for the encouragement and promotion of the activities involved. Sponsorship shall be subject to the following conditions:

(a) There shall be no requirement for the exclusive sale of the sponsor's products nor shall such products be sold exclusively at any such event.

(b) No money or other thing of value other than approved advertising specialties shall be given by a sponsor to anyone other than the organizations conducting the contest.

(c) Participants may be charged an entry fee, but entry shall not be conditioned upon the purchase of any of the sponsor's products.

(k) Wine Tapping Equipment. Suppliers of wine may furnish to on-sale licensees tapping accessories such as rods, vents, valves, hoses, washers, couplings and clamps in the case of either an initial installation for a new account or a change over of equipment from one system to another. Such equipment shall remain the property of the supplier. Suppliers may service and repair such items of equipment from time to time as necessary.

Authority cited: Sections 24757, 25006, 25600, 25503.1 and 25750, Business and Professions Code; Section 22 Article XX, California Constitution.

Reference cited: Sections 23301, 23025, 23386, 25500, 25501, 25502, 25503, 25503.1, 25600, 25611.1, 25612, 25616, 25752, and 25753, Business and Professions Code.